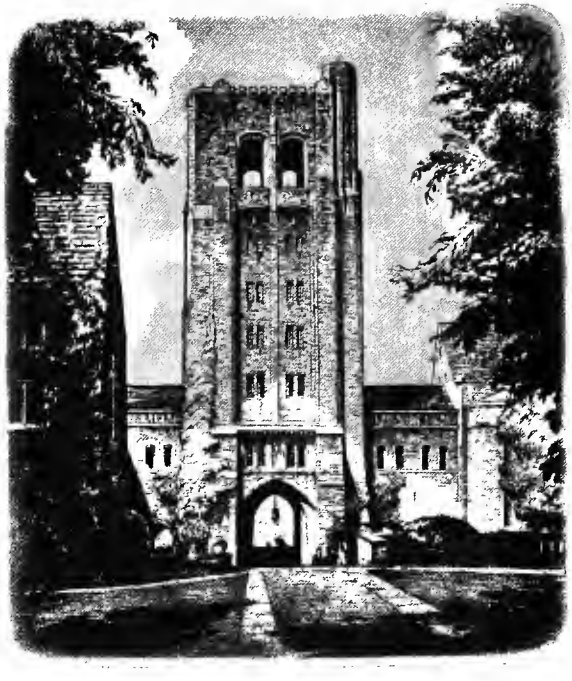

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OUTLINE

OF THE

JURISDICTION AND PROCEDURE

OF THE

FEDERAL COURTS

Prepared for the Use of Law Students

by

JOSEPH R. LONG

Professor of Law in Washington and Lee University

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CHAPTER I.

GENERAL OUTLINE OF FEDERAL JURISDICTION.

§ 1. The Judicial Power as Defined by the Constitution.

The judicial power, like all other powers of the United States, is conferred and defined by the Constitution, which provides that:

"The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states, between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects."[1]

Case Defined.—A "case" within the meaning of this section

[1]Const. Art. III, § 2.

of the Constitution is any subject on which the judicial power is capable of acting, and which has been submitted to it by a party in the forms required by law. A case may consist of the right of either party, plaintiff or defendant, and the provision embraces alike civil and criminal cases.[2]

Controversy Defined.—A "controversy" in the above connection is any dispute concerning rights or wrongs cognizable by law, and which may, therefore, be the subject of an action or involved therein. It is a less comprehensive term than "case" and seems to be included therein. It applies to civil matters only.[3]

§ 2. Analysis of Jurisdiction—Two Classes of Cases.

The jurisdiction conferred by the above provision comprises two general classes of causes: (1) Those in which the jurisdiction depends upon the *nature of the subject matter* involved, and, (2) Those in which the jurisdiction depends upon the *character or citizenship of the parties* to the suit.

"The second section of the third article of the Constitution," says Chief Justice Marshall, "defines the extent of the judicial power of the United States. Jurisdiction is given to the courts of the Union in two classes of cases. In the first their jurisdiction depends upon the character of the cause, whoever may be the parties. This class comprehends 'all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority.' This clause extends the jurisdiction of the court to all the cases described, without making in its terms any exception whatever, and without any regard to the condition of the party. If there be any excep-

[2]Cohens *v.* Virginia, 6 Wheat. 264; Osborn *v.* Bank, 9 Wheat. 738; Tennessee *v.* Davis, 100 U. S. 257; La Abra Silver Mining Company *v.* United States, 175 U. S. 423.

[3]Fish *v.* Henarie, 32 Fed. 423; In re Pacific R. Commission, 32 Fed. 225. See, also, Interstate Commerce Com. *v.* Brimson, 154 U. S. 447.

tion, it is to be implied against the express words of the article.

"In the second class the jurisdiction depends entirely on the character of the parties. In this are comprehended 'controversies between two or more states, between a state and citizens of another state,' 'and between a state and foreign states, citizens, or subjects.' If these be the parties, it is entirely unimportant what may be the subject of controversy. Be it what it may, these parties have a constitutional right to come into the courts of the Union."[4]

It will be observed that the instances given by the Chief Justice are not exhaustive but simply illustrative of each class of cases. The distinction between the two classes will appear more clearly when the particular instances of jurisdiction are considered. The jurisdiction includes the familiar divisions, jurisdiction at law, jurisdiction in equity, criminal jurisdiction, etc.

§ 3. Distinction between Law and Equity.

The Constitution preserves the familiar distinction between law and equity in the language "The judicial power shall extend to all cases, in law and equity, arising," etc. This distinction has been observed in practice in all the federal courts throughout the United States notwithstanding the fact that in many states the distinction between actions at law and suits in equity has been abolished by statute. But while the distinction is maintained in the federal courts, there are not, as formerly in England and still in a few of the states, separate courts of law and equity, but the same court sits in both capacities.

It may be worthy of remark that although the Constitutional provision clearly means that the federal judicial power shall extend to the adjudication of rights involving both legal

[4]Cohens *v.* Virginia, 6 Wheat. 264.

and equitable principles, it does not necessarily mean that separate forms of action shall be preserved. It is doubtless competent for Congress to abolish this distinction, as has been done in the so-called "code states," and establish a single system of judicial procedure, provided that in so doing the constitutional right to a jury trial guaranteed by the Seventh Amendment be not impaired. As a matter of fact, however, the single form of procedure is a modern innovation and was unknown when the federal judicial system was established, and the legislation of Congress has always recognized the double system of procedure.[5]

§ 4. Jurisdiction at Law—In General.

The constitution provides that "The judicial power shall extend to all cases, *in law* and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority." Taken literally, this language would seem to include cases of a *legal* nature in the technical sense, such as were within the jurisdiction of the courts of common law, *arising under the Constitution, laws and treaties of the United States,* that is, cases of a legal nature arising under the federal *written* law. Under this construction, while the principles of the common law as to procedure, evidence, construction, etc., might be applied in the determination of causes arising under the federal Constitution, laws and treaties, there would be no room for the contention that by this clause the judicial power is extended to cases at common law generally unconnected with the Constitution, laws or treaties of the United States. In other words, this clause, so construed, does not amount to an adoption for the United States at large of the common law generally in the same sense in which the several states, by constitutional provision or statute, have adopted the common law.

[5]See Street, Fed. Eq. Prac., §§ 11, 12.

In those cases of which the federal courts have jurisdiction because of the citizenship or character of the parties, the character of the suit, as at law, in equity, etc., and the nature of the subject matter involved, are immaterial, and in all such cases, of course, the judicial power extends to cases at law, as well as to those in equity, etc., provided the requirement as to citizenship or character of the parties is satisfied.

§ 5. Same—The Federal Common Law—In General.

In view of the fact that the federal government is a government of delegated powers and may exercise only such powers as are granted to it in the Constitution, and the further fact that the Constitution has nowhere in terms formally extended the judicial power of the United States to the common law as a whole, but only to cases at law arising under the Constitution, etc., of the United States, it has long been customary to declare that there is no national or federal common law.[6]

It might be answered that it has always been conceded that the clause of the Constitution quoted in the preceding section vests in the federal courts a general jurisdiction in equity. If so, no good reason can be advanced why it should not also vest in such courts a general common law jurisdiction. The construction that discovers in this clause a grant of general equity jurisdiction may, perhaps, be a strained construction, but it is universally accepted. By a familiar principle of construction, the terms "law" and "equity" coupled together in the expression, "in law and equity," should be given equivalent force. It is not sound to construe the term "equity" liberally and give a strict construction to the term "law."

Again, the federal written law (Constitution, laws, and treaties) does not constitute a complete system of law, but is fragmentary and covers only a small portion of the great

[6]Hughes' Fed. Proc., § 3; Wheaton *v.* Peters, 8 Pet. 591.

range of subjects with which a court of justice may be called upon to deal, and these often only partially, and hence it is an absolute necessity that the federal courts in administering justice should supplement the federal written law with the principles of the common law. This is plainly true when the court is administering the federal written law. Moreover, in many of the cases in the federal courts no question of federal law at all is involved, but the jurisdiction of the court depends upon the citizenship or character of the parties. Most of these cases are to be determined wholly or in part by the common law. In thus administering the common law, it is commonly considered that the federal courts are administering not a federal common law, but the common law of the states in which they are sitting. This is undoubtedly true in many cases. But it frequently happens that the case is one to which the local law of the state is not applicable, and to which also there is no federal written law that can apply. Such cases must be decided by *some* common law, and plainly this can only be a federal common law. The Constitution certainly contemplated that such cases should be determined according to some law, and where there is no federal written law on the subject, and yet the case is clearly within federal and not state jurisdiction, it would seem to be fairly implied that in extending the judicial power to such cases the Constitution has adopted the principles of the English common law so far as applicable to such cases. This, at least, has been the practical construction by the courts.

In administering the common law the federal courts generally follow the decisions of the courts of the state—practically always in matters of purely local interest, as, for example, in matters relating to the title to real property within the state, or the status and relations of persons within state jurisdiction. In this class of cases they are administering state law.[7] But in matters of general interest, especially in

[7]See post, § 25.

connection with commercial matters, the federal courts do not feel bound by the state decisions, but act upon their own convictions as to what is right, thus administering their own, that is, a federal common law. This principle applies to questions arising under the law merchant and in connection with insurance, contracts, negligence, general corporation law, and the like. So also in connection with subjects placed by the Constitution exclusively within federal jurisdiction, for example, interstate commerce—to which plainly no state law could apply—the federal courts apply the principles of the common law where there is no act of Congress applicable to the case.[8]

§ 6. Same—Same—Authorities.

Many cases illustrating and supporting the proposition that there is a distinct national or federal common law might be cited.[9] We mention several late cases. In *Western Union Telegraph Co.* v. *Call*,[10] a case of interstate commerce, to which state law could not apply, the common law was applied, there being no act of Congress covering the case. In the opinion the court said: "The principles of the common law are operative upon all interstate commercial transactions except so far as they are modified by Congressional enactment." So in *Kansas* v. *Colorado*[11] the common law of riparian rights was applied in a suit between the two states involving the

[8]Swift *v.* Tyson, 16 Pet. 1; Railroad Co. *v.* Lockwood, 17 Wall. 357; Railroad Co. *v.* Baugh, 149 U. S. 368. A different rule may prevail in the federal and state courts. Pennsylvania R. Co. *v.* Hughes, 191 U. S. 477.

[9]For an elaborate review of the authorities and an unanswerable argument in favor of the existence of a "common law of the United States," see the opinion of Judge Shiras, in Murray *v.* Chicago, etc., R. Co., 62 Fed. 24. See, also, the valuable article, "Federal Common Law," by Hunsdon Cary, Esq., in 10 Virginia Law Register 476 (October, 1904).

[10]181 U. S. 92.

[11]206 U. S. 46.

use of the Arkansas River, an interstate stream. In this case, after reviewing a number of cases involving more or less the recognition of a federal common law, the court said: "In other words, through these successive disputes and decisions this court is practically building up what may not improperly be called interstate common law." And in *Presidio County* v. *Noel-Young Bond Co.*[12] the court said: "Since the decision in *Swift* v. *Tyson,* 16 Pet. 1, 19, it has been the accepted doctrine of this court that, in respect to the doctrines of commercial law and general jurisprudence the courts of the United States will exercise their own independent judgment, and in respect to such doctrines will not be controlled by decisions based upon local statutes or local usage, although if the question is balanced with doubt, the courts of the United States, for the sake of harmony, will lean to an agreement of views with the state courts. To that effect are *Burgess* v. *Seligman,* 107 U. S. 20, 33, 34; *Pana* v. *Bowler,* 107 U. S. 529, and *Oates* v. *National Bank,* 100 U. S. 239, 246, and authorities cited in each case."

§ 7. Same—Same—Classification of Federal Common Law.

We conclude that there is a national common law in at least two general classes of cases:

(1) Cases involving matters of general interest not placed by the Constitution within the federal legislative power and to which, by reason of the nature of the subject or the character of the parties, the law of a state could not properly apply.

(2) Cases connected with subjects placed by the Constitution within federal legislative control exclusively but in respect to which Congress has not legislated. These cases must be governed by a federal common law or be subject to no law at all, which clearly cannot be permitted.

[12]212 U. S. 58.

A curious situation arises in connection with cases of the first class involving subjects not within the federal legislative power. As to these cases there exists a common law which cannot be altered or affected by legislation. In commenting upon the rule of the federal courts to formulate their own rule as to questions of general jurisprudence or commercial law, a recent able writer says: "The fundamental objection to this rule of the court is that as Congress cannot under the Constitution legislate on any other than a federal subject matter, the enforcement by the federal court, in controversies as to contracts, or commercial obligations, or title to real property [depending upon general principles of law], of a law different from the state law, as formulated in its acts of legislation and in the judgments of its courts, is nothing else than the establishment and enforcement of a body of judge-made law with no statutory basis and without possibility of legislative amendment."[13]

§ 8. Jurisdiction in Equity.

The equity jurisdiction of the federal courts is in general the same as that possessed by the former High Court of Chancery in England, except, of course, that it is restricted to matters of federal cognizance. The jurisdiction, however, is not confined to the very rights and remedies recognized and employed at the time of the adoption of the Constitution. The principles and practice of the High Court of Chancery constitute the foundation upon which the equitable jurisprudence of the federal courts is based, but upon this basis these courts have built up and developed a distinct system of equitable doctrines suited to conditions existing in this country at the present time.[14]

In general the equity jurisdiction and practice of the federal courts is uniform throughout the United States, though to a

[13]Patterson, United States and States under the Constitution, p. 242.
[14]Street, Fed. Eq. Prac., § 94; Ellis *v.* Davis, 109 U. S. 497.

limited extent variations in practice and procedure occur as a result of the regulation by the several courts of their own practice in matters not covered by acts of Congress or rules prescribed by the Supreme Court.

The equity jurisdiction of the United States is, of course, entirely beyond the control of the states, and the equity powers granted by the Constitution cannot be limited or restrained by state legislation. However, the federal courts may enforce new rights or grant new equitable remedies or relief created by the legislation of the state in which the court sits or where the right to be enforced arose, and thus the equitable jurisdiction of the federal courts may be to some extent enlarged by the legislation of the state.

It is provided by Congress that "suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law."[15] This section is merely declaratory of the familiar rule of equity jurisdiction.[16]

§ 9. Criminal Jurisdiction.

The question as to whether the federal courts have a common law jurisdiction of crimes is in fact a part of the general question whether there is a federal common law, and in accordance with the doctrine that was long in theory held that there is no federal common law, it has for a long time been held, and may be regarded as settled, that there are no common law offenses against the United States, and no one can be prosecuted criminally in the federal courts except for a violation of a statute, or for the crime of treason, which is defined by the Constitution.[17]

[15]Rev. St., § 723; 4 Fed. St. Am. 530.

[16]See generally, as to federal equity jurisdiction, Foster, Fed. Proc. (2nd Ed.), §§ 1-12; 29 Am. & Eng. Enc. L. 233-236; 4 Fed. St. Ann. 530-534; 9 Ibid. 81-83.

[17]United States *v.* Eaton, 144 U. S. 677; 9 Fed. St. Ann. 108.

Nevertheless, when Congress adopts or creates a common-law offense, without clearly defining it, the courts may generally adopt the common-law definition.[18] There are numerous statutory offenses, such as counterfeiting, offenses under the postal laws, or against the revenue laws, etc.[19]

It may be not without interest to note that in several very early cases the federal courts assumed jurisdiction of common law offenses against the United States, and that as late as 1816 the Supreme Court regarded the question of jurisdiction of such cases as unsettled.[20]

[18]29 Am. & Eng. Enc. L. 233.

[19]See the new Penal Code of 1909. 35 Stat. L. 1080; Supp. (1909) Fed. St. Ann. 405.

[20]United States *v.* Coolidge, 1 Wheat. 415. See the earlier case United States *v.* Hudson (1812), 7 Cranch 32. For a statement and discussion of the earlier cases, see 1 Whart. Crim. Law, §§ 156-173. After stating several cases in which indictments at common law were sustained in the federal courts, Mr. Wharton says, "Such was the state of the law when Judge Chase, in Worrell's case [2 Dall. 384, decided in 1798 by Judges Chase and Peters in the Circuit Court], * * * without waiting to learn what had been decided by his predecessors, startled his colleague and the bar by announcing that he would entertain no indictment at common law." In this case, the court being equally divided, a verdict of guilty was sustained.

CHAPTER II.

PARTICULAR INSTANCES OF JURISDICTION.

§ 10. In General.

By the constitutional provision the federal judicial power is extended to nine distinct classes of cases, as follows: (1) All cases, in law and equity, arising under the Constitution, laws, and treaties of the United States; (2) All cases affecting ambassadors, other public ministers and consuls; (3) All cases of admiralty and maritime jurisdiction; (4) Controversies to which the United States shall be a party; (5) Controversies between two or more states; (6) Controversies between a state and citizens of another state; (7) Controversies between citizens of different states; (8) Controversies between citizens of the same state claiming lands under grants of different states; and (9) Controversies between a state, or the citizens thereof, and foreign states, citizens or subjects. We shall consider each case separately.

§ 11. Cases Involving a Federal Question.

The judicial power extends to, "All cases, in law and equity, arising under this Constitution, the laws of the United

States, and treaties made, or which shall be made, under their authority."

A case is said to arise under the Constitution, or a law or a treaty of the United States, whenever its correct decision depends upon the construction of either. It is such as grows out of the Constitution, etc., and may consist in whole or in part of the right, claim, privilege, protection or defence of the party asserting it.[1]

Cases included in this clause are said to involve a "federal question," and the jurisdiction of the federal courts depends solely upon this fact and is wholly independent of the citizenship or character of the parties.

§ 12. Cases Affecting Ambassadors, etc.

Cases affecting ambassadors, other public ministers and consuls are suits brought by or against ambassadors, etc., or in which they are personally interested as parties or privies in the result of the litigation. A prosecution by the government for an assault upon a foreign minister is not a case affecting him within this clause.[2]

The jurisdiction of cases under this clause grows out of the character of the parties and the subject matter in dispute is immaterial.

§ 13. Cases of Admiralty and Maritime Jurisdiction.

These cases embrace generally all cases growing out of the transportation of passengers and goods upon the high seas and on the navigable waters of the United States, including particularly maritime contracts, torts, etc. A case in admiralty is not a case arising under the Constitution or laws of the United States, but these cases, says Chief Justice Marshall, "are as old as navigation itself; and the law, admiralty and maritime,

[1]See Tennessee *v.* Davis, 100 U. S. 257. For definition of "case" in this and the two following clauses, see ante, § 1.

[2]United States *v.* Ortega, 11 Wheat. 467.

as it has existed for ages, is applied by our courts to the cases as they arise."[3] The jurisdiction, therefore, exists under this clause and not under the first clause of this section.

The judicial power over admiralty and maritime cases, though related to the power of Congress over commerce, is an entirely distinct and independent grant of power.

§ 14. Controversies to Which the United States is a Party.

The United States may be plaintiff in a suit, and by its consent, but not otherwise,[4] may be sued as defendant. This clause covers causes to which the United States is a party either as plaintiff or as defendant. As plaintiff the United States has ordinarily the same civil remedies as individuals have, but it may be sued only in such courts and in such cases and under such conditions and regulations as Congress may prescribe.[5] The United States has consented to be sued in certain cases in the Court of Claims, which has jurisdiction of such suits.[6]

Suits Between United States and a State.—The United States may sue a state without any further consent on the part of the state than the latter's acceptance of the Constitution.[7] But the United States cannot be sued by a state without its consent.[8] Suits may be brought by a state against the United States in the Court of Claims.[9]

§ 15. Controversies Between Two or More States.

Many such controversies between states have arisen, usually in connection with disputed boundaries, as for example, the

[3]American Ins. Co. *v.* Canter, 1 Pet. 511.
[4]United States *v.* Lee, 106 U. S. 196.
[5]29 Am. & Eng. Enc. L. 171-174.
[6]See post, § 53.
[7]United States *v.* Texas, 143 U. S. 621.
[8]Kansas *v.* United States, 204 U. S. 331.
[9]See South Carolina *v.* United States, 199 U. S. 437.

cases of Virginia against West Virginia,[10] of Louisiana against Mississippi,[11] Washington against Oregon,[12] and others. A number of suits on other subjects have also been brought, for example, the case of Missouri against Illinois[13] to restrain the pollution of the Mississippi River, or of South Dakota against North Carolina[14] on bonds of the defendant state, or of Kansas against Colorado[15] to restrain the diversion of the Arkansas River, or of Virginia against West Virginia[16] for an apportionment of the state debt.

To come within the meaning of this clause the controversy must be one arising directly between the states and not a controversy in vindication of the grievances of particular individuals. Private persons will not be permitted, under this clause, to make use of the name of a state as nominal plaintiff in order to prosecute their claims against another state.[17]

§ 16. Controversies Between a State and Citizens of Another State.

This clause clearly includes suits by a state against a citizen of another state.[18] And by its terms it seems to include also suits against a state by a citizen of another state, and it was so held in 1793 in the celebrated case of *Chisholm* v. *Georgia* in which the Supreme Court entertained a suit by a citizen of South Carolina against the state of Georgia.[19] This decision led to the adoption of the Eleventh Amendment, which pro-

[10]11 Wall. 39.
[11]202 U. S. 1.
[12]211 U. S. 127.
[13]200 U. S. 496.
[14]192 U. S. 286.
[15]206 U. S. 46.
[16]206 U. S. 290.
[17]Louisiana *v.* Texas, 176 U. S. 1. See, also, New Hampshire *v.* Louisiana, 108 U. S. 76.
[18]See Texas *v.* White, 7 Wall. 700.
[19]2 Dall. 419.

vides the "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state." Since the adoption of this amendment no state can be sued by a citizen of another state without its consent, and the fact that the case involves a federal question does not give the federal courts jurisdiction of such a suit.[20]

The determination of the question "what constitutes a suit against a state?" within the meaning of this Amendment is frequently a matter of no little difficulty, and numerous cases involving this question have arisen.[21]

It is to be noted that the federal jurisdiction does not extend to controversies between a state and its own citizens unless a federal question is involved.

§ 17. Controversies Between Citizens of Different States.

This is one of the most important classes of cases within the federal jurisdiction. The object of placing these controversies within the jurisdiction of the federal courts is plainly to secure their settlement by an impartial tribunal.

To bring a suit within the federal judicial power under this clause, it is sufficient that the plaintiff and defendant are citizens of different states. If this requirement of diversity of citizenship is satisfied, it is immaterial what is the subject-matter of the controversy, or whether the suit involves questions of federal or of state law. To satisfy the requirement of diversity, however, where there are several plaintiffs or defendants, all the plaintiffs must be of different citizenship from all the defendants.[22] But the fact that a mere formal party

[20]Hans *v.* Louisiana, 134 U. S. 1.

[21]See 9 Fed. St. Ann. 362-374. See, also, the title "States" in Cyclopedia of Law and Procedure.

[22]Peper *v.* Fordyce, 119 U. S. 469; Wilson *v.* Oswego Township, 151 U. S. 56; Hooe *v.* Jamieson, 166 U. S. 395, 4 Fed. St. Ann. 294.

having no control of or interest in the suit is a citizen of the same state as the adverse party, does not oust the federal court of jurisdiction if the real parties in interest are citizens of different states.[23]

§ 18. Same—Who Are Citizens.

It is important to determine who are citizens of a state within the meaning of this and kindred provisions. In 1832 it was held by the Supreme Court that a citizen of the United States (in this case a naturalized citizen) residing in any state of the Union, is a citizen of that state, within the meaning of this section.[24] The Fourteenth Amendment provides that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside."

A corporation is regarded as a citizen of the state which created it, regardless of the citizenship of the stockholders or members, the location of its principal office, or the field of its operations.[25] A railroad company owning and operating a line running through several states, may receive and exercise powers granted by each, and be for some purposes regarded as a corporation of each state, without being a citizen of every state through which it passes, within the meaning of the jurisdiction clause of the Constitution;[26] *National banks* are, by statute, citizens of the state in which they are located.[27] *A state* is not a citizen within the meaning of the Constitution.[28] *A territory is not a state,* and its citizens are not citizens of a

[23]Wilson *v.* Oswego Township, 151 U. S. 56; 4 Fed. St. Ann. 293.

[24]Gassies *v.* Ballou, 6 Pet. 761. See, also, Shelton *v.* Tiffin, 6 How. 163.

[25]Steamship Co. *v.* Tugnan, 106 U. S. 118; Shaw *v.* Quincy Min. Co., 145 U. S. 444; 4 Fed. St. Ann. 290.

[26]St. Joseph, etc., R. Co. *v.* Steele, 167 U. S. 659.

[27]25 Stat. L. 436; 5 Fed. St. Ann. 193.

[28]Stone *v.* South Carolina, 117 U. S. 430; Minnesota *v.* Northern Securities Co., 194 U. S. 48.

state, within the meaning of this section.[29] And the same rule applies to the District of Columbia.[30]

§ 19. Same—Change of Citizenship.

The mere fact that a citizen of one state removed to another state for the purpose of qualifying himself to sue in a federal court under this section, does not oust the court of jurisdiction, where it was his *bona fide* intention to acquire a domicile in the state to which he removed. But it is otherwise if he had no such intention. It is the fact of citizenship, not the motive with which citizenship was acquired, that determines the question.[31]

Change After Suit Commenced.—The question of jurisdiction on the ground of diversity of citizenship is determined by the state of things existing when the suit was brought. A change of citizenship during the pendency of the suit, which destroys the diversity, will not oust the federal courts of jurisdiction on the ground of diverse citizenship.[32]

§ 20. Controversies Involving Conflicting Land Grants.

The judicial power extends to controversies "between citizens of the same state claiming lands under grants of different states." Very few cases have arisen under this clause.[33]

§ 21. Controversies Between a State, etc., and Foreign States, etc.

By the last clause of this section the judicial power is extended to controversies "between a state, or the citizens thereof, and foreign states, citizens or subjects." This clause includes controversies between; (a) A state (as plaintiff or

[29]New Orleans *v.* Winter, 1 Wheat. 91.
[30]Hooe *v.* Jamieson, 166 U. S. 395; 4 Fed. St. Ann. 290.
[31]Morris *v.* Gilmer, 129 U. S. 315.
[32]Anderson *v.* Watt, 138 U. S. 694; 4 Fed. St. Ann. 292.
[33]Examples are Colson *v.* Lewis, 2 Wheat. 377; Town of Paulet *v.* Clark, 9 Cranch 292. See, also, Stevenson *v.* Fair, 195 U. S. 165.

defendant) and a foreign state (not a state of the Union); (b) a state (as plaintiff only since Amendment XI) and a foreign citizen or subject; (c) a citizen of a state (as plaintiff or defendant) and a foreign state; (d) a citizen of a state and a foreign citizen or subject.

Suits Between Aliens.—The federal judicial power does not extend to suits between aliens, where no federal question is involved,[34] though Chief Justice Marshall said: "Whatever doubts may exist in a case where the jurisdiction may be objected to, there ought to be none where the parties assent to it."[35]

[34]Montalet *v.* Murray, 4 Cranch 46; 4 Fed. St. Ann. 298.
[35]Mason *v.* Ship Blaireau, 2 Cranch 240.

CHAPTER III.

DISTRIBUTION OF JURISDICTION—FEDERAL AND STATE JURISDICTION.

§ 22. Legislation Affecting Jurisdiction.

The grant of federal judicial power as above discussed is in general terms, and the Constitution has left to Congress the establishment of the federal courts (other than the Supreme Court) and the distribution of the judicial power among them. The provisions of the Constitution, with a few exceptions, are not self-executing, but can be made operative only by legislation.

In 1789 Congress passed the Judiciary Act, which forms the basis of the federal judicial establishment. This act has been several times amended. And numerous other statutes have conferred jurisdiction in particular cases upon the various federal courts. These courts have only such jurisdiction as is conferred upon them by Congress, or, in the case of the Supreme Court, by the Constitution.

It was declared by the Supreme Court in an early case that the provision of the Constitution that the judicial power shall be vested in one Supreme Court and in such inferior courts as Congress may from time to time ordain and establish, is mandatory, and that it is the duty of Congress to vest the whole

judicial power in the federal courts.[1] But this view has not prevailed. From an examination of the jurisdiction of the several courts as defined by Congress, it will be found that Congress has not yet fully exercised its power in this connection. Many cases which, under the Constitution, come within the federal judicial power are not within the jurisdiction of any federal court. Thus, although the Constitution extends the judicial power to all cases arising under the Constitution, laws, and treaties of the United States, Congress has conferred jurisdiction of such cases upon the federal courts only where an amount exceeding $2,000 is involved. Cases of this class involving less amounts can be brought only in the state courts.

§ 23. Exclusive Jurisdiction of Federal Courts.

Congress has made the jurisdiction of the federal courts exclusive of the state courts in the following cases:[2]

(1) *Crimes.*—Of all crimes and offenses cognizable under the authority of the United States. *Note.* The same act may be an offense against both the state and the federal laws, and be punished by both governments as two distinct offenses; e. g., counterfeiting.

(2) *Penalties and Forfeitures.*—Of all suits for penalties and forfeitures incurred under the laws of the United States.

(3) *Admiralty and Maritime Cases.*—Of all civil causes of admiralty and maritime jurisdiction; saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it.

(4) *Seizures.*—Of all seizures under the laws of the United States, on land or on waters not within admiralty and maritime jurisdiction.

[1]Per Story, J., in Martin *v.* Hunter, 1 Wheat. 330. See, generally, the article "The Delegation of Federal Jurisdiction to State Courts by Congress" in 43 American Law Review 852.

[2]Rev. St., § 711, 4 Fed. St. Ann. 493.

(5) *Patent and Copyright Cases.*—Of all cases arising under the patent right or copyright laws of the United States. *Note.* This does not deprive the state courts of jurisdiction of suits arising out of contracts relating to patents or copyrights in which the validity of the right is not questioned, and the question of infringement is not involved.

(6) *Bankruptcy.*—Of all matters and proceedings in bankruptcy. *Note.* This is operative only when a national bankruptcy act is in force.

(7) *Suits Where State is Party.*—Of all controversies of a civil nature where a state is a party, except between a state and its citizens, or between a state and citizens of other states or aliens. *Note.* This can apply only to suits between different states or between a state and the United States or a foreign state.

§ 24. Concurrent Jurisdiction—Administration of Federal Law by State Courts.

It would, no doubt, have been competent for Congress to have conferred upon the federal courts exclusive jurisdiction of all matters of federal cognizance.[3] This, however, would have resulted in intolerable hardship, for under our dual system of jurisprudence (state and federal) it is inevitable that in almost any case that can arise there may be some feature which may bring it within the federal jurisdiction, and hence the state courts would be without jurisdiction if the jurisdiction of the federal courts were exclusive. This would prevent litigants from suing in the state courts in the first instance, where the fact that the case is within federal jurisdiction then appears, or oust the court of jurisdiction of pending causes, should a ground of federal jurisdiction develop after suit was brought.

[3]See The Moses Taylor, 4 Wall. 411; Claflin *v.* Houseman, 93 U. S. 130; Robb *v.* Connally, 111 U. S. 624; Plaquemes Tropical Fruit Co. *v.* Henderson, 170 U. S. 511.

Congress has wisely refrained from exercising its full power in this connection and has made the federal jurisdiction exclusive only in a few classes of cases, and these of a sort which may very well be left exclusively to the federal courts. These cases are enumerated in the section immediately preceding.

In all other cases the state courts may administer federal law concurrently with the federal courts, and where a case has been adjudicated in a state court it cannot be relitigated in a federal court on the ground that it might have been brought in such court in the first instance. It is *res adjudicata.*[4] As we shall see, however, a cause pending in a state court may in certain cases be removed to a federal (Circuit) court, and also a writ of error lies from the United States Supreme Court to the state courts in certain cases.

In connection with the administration of federal law by the state courts it may be noted that in an important sense the federal *written* law (not the federal common law) is also the law of the several states. The Constitution provides that "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."[5] "The Constitution, laws, and treaties of the United States," says Chief Justice Fuller, "are as much a part of the laws of every state as its own local laws and constitution."[6] This declaration, however, must be taken with the qualification that the states have not the same control over the federal law (e. g., in the matter of enactment or repeal) as over their own law, and, moreover, it would probably be possible for Congress to take

[4]29 Am. & Eng. Enc. L. 230; Claflin *v.* Houseman, 93 U. S. 130; Blythe *v.* Hinckley, 173 U. S. 501.

[5]Art VI, cl. 2.

[6]Blythe *v.* Hinckley, 173 U. S. 501.

away the jurisdiction of the state courts of federal law by making the federal jurisdiction exclusive, which, of course, it could not do in the case of state law.

The state courts in administering federal law are not federal courts.[7] The state courts are, of course, bound by the decisions of the United States Supreme Court in matters of federal law, but not by the decisions of the inferior federal courts.[8]

§ 25. Same—Administration of State Law by Federal Courts.

In our analysis of the judicial power of the United States we have found that there are two general classes of cases included within the federal judicial power, namely, cases in which the jurisdiction depends upon the character of the cause, as raising for decision a question of federal law, and those in which the jurisdiction depends upon the character or citizenship of the parties. For the most part the federal courts in deciding cases of the first class administer simply the federal law, as found in the federal Constitution, statutes, or treaties, with or without an element of federal common law.

But in cases of the second class, of which the most important example is perhaps the case of diverse citizenship, there is often no federal law that is applicable. Such cases are clearly to be governed by the law of the state in which the court sits, except when, under the rules relating to the conflict of laws, the law of some other state applies. The object of giving the federal courts jurisdiction of such cases is principally to provide an impartial forum, and this object is fully attained by allowing the suit to be brought in the federal court, and there is no occasion also to change the law which is to be applied to the case. If the suit were brought in the state court (as it might be if the

[7]United States *v.* Severino, 125 Fed. 953. For additional authorities, as well as some early authority to the effect that the state courts in administering federal law are to that extent federal courts, see 43 American Law Review, 866.

[8]26 Am. & Eng. Enc. L. 172-174.

state law so provides) it would have to be decided by state law, either the law of the forum state or of some other state, as the case may be. The fact that the suit is brought in a federal court instead of in a state court, does not alter the case. It must still be governed by the same law. In giving the federal courts jurisdiction of such cases the federal Constitution clearly authorizes the federal courts to administer the appropriate state law. A large part of the law administered by the federal courts is thus state law.

In accordance with the above principle, the Judiciary Act provides that "The laws of the several states, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."[9] This provision, however, is simply declaratory of the law existing independently of this enactment.[10]

Since each state has the sole right to determine what is and shall be its own law in respect to all matters not delegated in the Constitution to the United States, it would seem perfectly plain, that in applying the law of a state the federal courts are bound by the decisions, if any, of the state courts of last resort as to what the state law is. If the state courts have established a certain rule of law as being the law of the state, the federal courts have no power to declare the law to be something else. The federal courts in administering state law exercise an independent though concurrent jurisdiction; "but it does not follow that the federal judges should be at liberty to ascertain and declare the law of the state according to their own judgment, not of what that law is, but of what that law ought to be. On the contrary, the law of a state, like the law of a foreign

[9]Rev. St., § 271, 4 Fed. St. Ann. 517. For collection of authorities on the general subject of the administration of state law by the federal courts, see notes to this section in 4 Fed. St. Ann. 517-529. See also, 22 Enc. Pl. & Pr. 324.

[10]Bergman *v.* Bly, 66 Fed. 40.

country should be proven and found as a fact by the federal judges."[11] It shocks common sense that a federal court should have power to declare the state law differently from what the state courts have declared it to be,—that the law of the state should be one thing in a state court and a different thing in a federal court. Two inconsistent rules cannot both be the law of the same state at the same time.

Consistently with the foregoing, the federal courts have generally recognized the binding effect of state decisions in determining matters of state law, particularly in connection with the construction of the constitution and statutes of the state.

Where there is no authoritative declaration of the state courts as to what the state law is, then "it is the right and duty of the federal courts to exercise their own judgment, as they also always do in reference to the doctrines of commercial law and general jurisprudence."[12] The right of the federal courts in such cases to determine for themselves what the state law is grows out of the necessity of the case, and is doubtless authorized by the provision of the Constitution conferring jurisdiction to administer state law upon the federal courts.

This right of independent judgment has also been asserted and exercised by the federal courts in refusing to follow decisions of the state courts rendered after the cause of action accrued.[13]

The situation is thus summarized by a recent writer, after quoting the provision of the Judiciary Act above set out: "This statutory requirement ought to have been construed to require the application of state rules of law as evidenced by state constitutions, statutes, and judgments of state courts of last resort, in all cases where the jurisdiction attaches solely by reason of diverse citizenship, but the court has held otherwise,

[11]Patterson, United States and States Under the Constitution, § 109.
[12]Burgess *v.* Seligman, 107 U. S. 20.
[13]Burgess *v.* Seligman, 107 U. S. 20; Julian *v.* Central Trust Co., 193 U. S. 93; Great Southern Hotel Co. *v.* Jones, 193 U. S. 532.

and it is settled law, that while the courts of the United States will accept and follow a fixed construction by the judicial department of a state of its constitution and statutes, yet, when the decisions of the state's courts of last resort are not consistent, the United States courts do not feel bound to follow the last decision, nor will the federal courts follow a state decision rendered after the cause of action has accrued."[14]

The independence of the federal courts in matters of general commercial law, and subjects of general jurisprudence of interstate application, has already been pointed out. In these matters the federal courts do not feel bound by the state decisions, but administer what we have found to be a federal common law.[15]

The federal courts in administering state law are not state courts. Though they exercise a jurisdiction in a sense concurrent with that of the state courts, they are not established by the state and cannot be in any way controlled by the state. They are technically foreign courts. A federal court sitting in Norfolk is no more a Virginia court than a United States battleship in Norfolk harbor is a Virginia ship, or a company of United States regulars stationed at Fortress Monroe are Virginia troops. However, some writers who still deny that there is any federal common law, and insist that the federal courts are administering state law even where they adopt a different rule of law from that recognized by the state courts, sometimes support this position by the extraordinary claim that the federal courts are courts of the state in which they sit.[16] Clearly a federal court can properly be called a state court only in a very

[14]Patterson, United States and States Under the Constitution, § 109.

[15]See, ante, §§ 5-7.

[16]See, for example, editorial in 18 Harvard Law Review 134. Mr. Hughes, while not calling the federal courts "state courts," remarks that "The federal court of a state is not an alien tribunal." Hughes' Fed. Proc., p. 6. Elsewhere he calls the state and federal courts "two independent and co-ordinate sets of courts administering the same body of law in different ways." Ibid., p. 13.

special and limited sense. A court established and controlled by Congress cannot be a state court in the same sense as a court established and controlled by the state is a state court. It is a state court only in that it is a court of the Union of which the state is a member, and also in that the state has assented to the federal Constitution under which the federal court is established and empowered to administer state law.

§ 26. Comity Between State and Federal Courts.

In cases within the concurrent jurisdiction of the state and federal courts, the court which first acquires jurisdiction of a case must usually be permitted to proceed therein to final judgment without interference by the other court. If the federal court first acquires jurisdiction, it will protect its jurisdiction by injunction or otherwise from interference by the state courts; and, conversely, if the suit is first brought in the state court, the federal court will not interfere or assume jurisdiction, except in cases proper for removal.[17]

Congress has provided that "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except where such injunction may be authorized by any law relating to proceedings in bankruptcy."[18] This section does not prevent a federal court from enjoining proceedings in a state court for the purpose of protecting its own jurisdiction.[19]

As has already been stated, the decisions of the state courts of last resort in matters of state law are usually binding upon all federal courts administering state law, and the decisions of the United States Supreme Court in matters of federal law are binding on the state courts administering federal law. Decisions in other cases are persuasive only.

[17]29 Am. & Eng. Enc. L. 231; 4 Fed. St. Ann. 509.

[18]Rev. St., § 720, 4 Fed. St. Ann. 509.

[19]Harkrader *v.* Wadley, 172 U. S. 148; Julian *v.* Central Trust Co., 193 U. S. 93.

§ 27. Comity Between Federal Courts Inter Se.

The decisions of inferior federal courts are not binding upon federal courts of the same grade, though they may have weight as persuasive authority. Thus the decisions of one District Court, or Circuit Court, or Circuit Court of Appeals, do not bind another District Court, or Circuit Court, or Circuit Court of Appeals, respectively. Nor do the decisions of one Circuit Court of Appeals bind the District and Circuit Courts of another circuit. The ruling of one District Court is usually binding in subsequent cases in the same district, and so as to the Circuit Courts. The decisions of a District Court are probably not binding on the Circuit Court of the same district, and *vice versa,* but should usually be followed. The nine Circuit Courts of Appeals are entirely independent of each other. As a matter of comity and for the sake of uniformity, the inferior courts should follow each other's decisions whenever practicable. As declared by the Circuit Court of Appeals of the first circuit in a case before it, "If the question at issue had been met by the United States Circuit Court of Appeals in any other circuit, we should, of course, lean strongly to harmonize with it."[20] Of course the decisions of the Supreme Court are binding on all inferior federal courts.

[20]Beal *v.* Somerville, 50 Fed. 647, 652.

CHAPTER IV.

THE SEVERAL FEDERAL COURTS AND THEIR JURISDICTION.

I. In General.

§ 28. The Constitutional Provisions.

The Constitution provides that "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish,"[1] and also that Congress shall have power "to constitute tribunals inferior to the Supreme Court."[2] The Constitution thus itself provides for a Supreme Court, but leaves the establishment of the inferior courts entirely to Congress.

§ 29. Judicial Districts and Circuits.

By the Judiciary Act and its amendments the United States is divided into judicial districts, each state forming at least one district, and the larger states being divided into two or more districts. Alabama and Pennsylvania are each divided into three districts, and New York and Texas into four. In many cases the districts are subdivided into two or more "divisions." The districts are entirely confined to the boundaries of a single state, no judicial district lying in two states. Altogether there are now about eighty districts and for each district there is a District Court and a Circuit Court.

The judicial districts are grouped by states into nine circuits, as follows: *First Circuit*: Rhode Island, Massachusetts, New

[1]Art. III, § 1.
[2]Art. I, § 8.

Hampshire, and Maine; *Second Circuit*: Vermont, Connecticut, and New York; *Third Circuit*: Pennsylvania, New Jersey, and Delaware; *Fourth Circuit*: Maryland, Virginia, West Virginia, North Carolina, and South Carolina; *Fifth Circuit*: Georgia, Florida, Alabama, Mississippi, Louisiana, and Texas; *Sixth Circuit*: Ohio, Michigan, Kentucky, and Tennessee; *Seventh Circuit*: Indiana, Illinois, and Wisconsin; *Eighth Circuit*: Nebraska, Minnesota, Iowa, Missouri, Kansas, Arkansas, Colorado, North Dakota, South Dakota, and Wyoming; *Ninth Circuit*: California, Oregon, Nevada, Washington, Montana, and Idaho.[3]

§ 30. The Federal Judges.

The federal judges are appointed by the President by and with the advice and consent of the Senate.[4] The Constitution provides that "The judges, both of the Supreme and inferior courts, shall hold office during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office."[5] The salary of a federal judge (unlike that of the President, who holds office for only four years) may be *increased* during his continuance in office, and Congress has on several occasions increased judicial salaries.[6]

A federal judge, being appointed for life ("during good behavior") can be removed from office only by impeachment proceedings, upon conviction of "treason, bribery, or other high crimes and misdemeanors."[7] The life tenure of the Supreme Court justices gives universal satisfaction, but the bar is not so

[3]4 Fed. St. Ann. 7.

[4]Const. Art. II, § 2.

[5]Const. Art. III, § 1.

[6]The salary of the Chief Justice of the Supreme Court is $13,500 a year, and that of the Associate Justices $13,000. The salaries of the district judges and circuit judges, respectively, are $6,000 and $7,000 a year.

[7]Const. Art. II, § 4.

well satisfied with this provision in the case of the inferior judges. Ordinarily the only way to get rid of a federal judge is for him to die or resign.[8] The remedy by impeachment can rarely be successfully employed.[9]

By the original Judiciary Act of 1789 the only judges provided for were the justices of the Supreme Court and the district judges. By an act of 1869 an additional judge for each circuit was provided for known as the "circuit judge." The number of circuit judges has since been increased. At present (1909) there are nine (9) Supreme Court justices, twenty-nine (29) circuit judges (from two to four for each circuit), and eighty-four (84) district judges, making a total of one hundred and twenty-two (122) federal judges in the regular federal judicial system.[10] Besides these there are judges of the Court of Claims, Court of Customs Appeals, etc.

§ 31. Enumeration of the Federal Courts.

By the Judiciary Act of 1789 Congress established the Circuit and District Courts, and these, with the Supreme Court, constituted the judicial system of the United States until 1855, when the Court of Claims was added. The Circuit Courts of Appeals and the temporary Court of Private Land Claims were added in 1891, and the Court of Customs Appeals in 1909. The American Bar Association has urged the establishment of

[8]Several justices of the Supreme Court have resigned, e. g. Chief Justice Oliver Ellsworth and Justices Benjamin R. Curtis and Henry B. Brown. Inferior federal judges also sometimes resign. Judges who have served ten years continuously and have attained the age of seventy years may retire on full pay for life. Rev. St., § 714 (Amended in 1909, Supp. (1909) Fed. St. Ann. 294).

[9]Five federal judges have been impeached, namely, Judge John Pickering in 1803, removed; Justice Samuel Chase of the Supreme Court, and Judge James Peck in 1804, both acquitted; Judge West H. Humphreys in 1860, removed; Judge Charles Swayne in 1905, acquitted.

[10]A complete list of the inferior federal judges by circuits will be found in each volume of the Federal Reporter.

a court of patent appeals, but no such court has yet been established.[11]

At the present the federal judicial system proper comprises the following courts of general jurisdiction: (1) District Courts, (2) Circuit Courts, (3) Circuit Courts of Appeals, and (4) the Supreme Court. To these may be added, as belonging to the judicial system, the two courts of special jurisdiction, namely, (5) the Court of Claims and (6) the Court of Customs Appeals. There are also other courts and quasi-courts established by Congress under other sections of the Constitution than those relating to the judicial power, such as the territorial and insular courts, the courts of the District of Columbia, the Interstate Commerce Commission, etc. These do not belong to the judicial system of the United States established under the provisions relating to the establishment of federal courts.

The federal judicial system as now constituted lacks symmetry in several respects. There are two trial courts, the District Court and the Circuit Court, where it would seem that a single court would be better. There is no good reason why the jurisdiction of these courts should not be consolidated and the two courts combined into a single trial court. As a matter of fact the same judge—usually the district judge—now ordinarily holds both courts, and they are thus practically already a single court. Again, there is a striking incongruity in connection with the allotment of judges. The district judges usually hold the Circuit Courts, and the circuit judges sit as judges of the Circuit Court of Appeals, while the latter courts are not provided with judges of their own. The judicial system would be simplified, and, it would seem, improved, by the establishment of a single trial court with complete jurisdiction instead of two courts with partial jurisdiction, and by the appointment of regular judges for the Circuit Courts of Appeals.

[11]The text of the proposed act establishing the court of patent appeals will be found in the report of the meeting of the American Bar Association in 1909 (vol. 34, p. 537).

II. The District Court.

§ 32. Organization.

There is a District Court for each judicial district. In each district, with a few exceptions, there is a district judge who constitutes the District Court for that district. In some instances one judge acts for two districts, and sometimes there are two judges for a single district. In 1908 the total number of district judges was 84. A district judge is required to reside in the district for which he is appointed.

The times and places of holding District Courts are appointed by law. There are usually two terms a year, with such special terms as business may require.

§ 33. Jurisdiction.

The jurisdiction of the District Court is wholly original, there being no federal court of inferior grade to it, and is both civil and criminal. The jurisdiction is largely special and exceptional, the Circuit Courts having jurisdiction over most controversies of a civil nature.

The Criminal Jurisdiction embraces practically all crimes and offenses not capital, cognizable under the authority of the United States, committed within the respective districts or on the high seas.[12] This jurisdiction is exclusive of that of the state courts[13] and concurrent with that of the Circuit Courts.[14]

The Civil Jurisdiction of the District Courts extends to a variety of matters[15] the most important cases being:

(1) All suits for penalties or forfeitures incurred under the laws of the United States.

[12]See 4 Fed. St. Ann. 218-236.
[13]Rev. St., § 563, 4 Fed. St. Ann. 218.
[14]Rev. St., § 711.
[15]Act of 1875-1888, 4 Fed. St. Ann. 266.

(2) All civil causes of admiralty and maritime jurisdiction. This jurisdiction is exclusive of the state courts, and also of the Circuit Courts except in certain cases.

(3) Bankruptcy proceedings. The District Court is the principal court of Bankruptcy.

(4) Cases arising under the Interstate Commerce Act (concurrent with Circuit Courts).

(5) Cases arising under the immigration laws (concurrent with Circuit Courts).

Of the above admiralty and bankruptcy causes are the most important.

III. The Circuit Court.

§ 34. Organization.

As a rule, there is a Circuit Court for each district, though occasionally one Circuit Court serves for two districts. The Circuit Courts were originally held by the district judges and the justices of the Supreme Court, there being no circuit judges prior to the act of 1869 making provision for their appointment. By the present law it is provided that "Circuit Courts shall be held by the circuit justice, or by the circuit judge of the circuit, or by the district judge of the district sitting alone, or by any two of said judges sitting together."[16] Also "It shall be the duty of the Chief Justice, and of each justice of the Supreme Court, to attend at least one term of the Circuit Court in each district of the Circuit to which he is allotted during every period of two years."[17] A member of the Supreme Court holding a Circuit Court is known as a "circuit justice." In practice the Circuit Court is usually held by a district judge.[18]

[16]Rev. St., § 609.

[17]Rev. St., § 610.

[18]Of 78 Circuit Court cases reported in volume 147, Federal Reporter, 67 were decided by a district judge and 11 by a circuit judge.

The times and places for holding the Circuit Courts are prescribed by law.[19]

§ 35. Jurisdiction.

Since the establishment by the act of 1891 of the Circuit Courts of Appeals the Circuit Court has been a court of original jurisdiction only. Prior to that act it had jurisdiction of appeals in certain cases from the District Court.

Criminal Jurisdiction.—The Circuit Court has "exclusive cognizance of all crimes and offenses under the authority of the United States, except as otherwise provided by law, and concurrent jurisdiction with the District Courts of the crimes and offenses cognizable by them."[20] It seems that the District and Circuit Courts have concurrent jurisdiction of all offenses (not specially provided for) not capital, and the Circuit Court has exclusive jurisdiction of capital offenses.

Civil Jurisdiction.—The Circuit Court is the most important court of general original civil jurisdiction in the federal system. It is the principal federal trial court, the jurisdiction of the District Court being, as we have seen, mostly of a special character. So many acts have been passed affecting its civil jurisdiction that it is difficult, if not impossible, to enumerate with accuracy and certainty all the subjects of such jurisdiction. A general statement of its jurisdiction as it existed in 1878 will be found in Section 629 of the Revised Statutes. An act covering the ground more or less completely was passed in 1875 and re-enacted in amended and corrected form in 1887 and 1888.[21]

The full text of the first section of this act, which defines the

[19]See 4 Fed. St. Ann. 680-734.

[20]Act of 1875-1888, 4 Fed. St. Ann. 266-299.

[21]25 Stat. L. 434, 4 Fed. St. Ann. 265. See annotations in 4 Fed. St. Ann. 267-311 for decisions under this section.

jurisdiction of the Circuit Courts, as it now appears, is as follows:

"[*Jurisdiction as dependent on citizenship, subject matter, and amount in controversy.*] That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which controversy the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different states, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid, or a controversy between citizens of the same state claiming lands under grants of different states, or a controversy between citizens of a state and foreign states, citizens, or subjects, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid, and shall have exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except as otherwise provided by law, and concurrent jurisdiction with the district courts of the crimes and offenses cognizable by them. But no person shall be arrested in one district for trial in another in any civil action before a circuit or district court; and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant; nor shall any circuit or district court have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument

be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made; and the circuit courts shall also have appellate jurisdiction from the district courts under the regulations and restrictions prescribed by law."

The jurisdiction as defined by this statute extends to five classes of cases, as follows:

(1) All suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum of $2,000, and arising under the Constitution, laws or treaties of the United States (Cases involving a "federal question").[22]

(2) Controversies in which the United States are plaintiffs or petitioners (Amount involved immaterial).

(3) Controversies between citizens of different states (Jurisdictional amount $2,000).

(4) Controversies between citizens of the same state claiming land under grants of different states (Amount involved immaterial).[23]

(5) Controversies between citizens of a state and foreign states, citizens and subjects (Jurisdictional amount $2,000).

It will be observed that any of the above suits may be brought either in the appropriate state courts or in the Circuit

[22]"A suit arises under the Constitution and laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution. It is not enough that the plaintiff alleges some anticipated defense to his cause of action and asserts that the defense is invalidated by some provision of the Constitution of the United States. Although such allegations show that very likely, in the course of the litigation, a question under the Constitution would arise, they do not show that the suit, that is, the plaintiff's original cause of action, arises under the Constitution." Per Moody, J., in Louisville, etc., R. Co. *v.* Motley, 211 U. S. 149.

[23]United States *v.* Sayward, 160 U. S. 493.

Court, subject, however, to the right of the defendant, as will be seen later, to remove a suit brought in a state court to the Circuit Court. The jurisdictional amount under the act of 1875 was $500.

Under other acts the Circuit Court has jurisdiction of various other cases, including especially suits relating to patents and copyrights, suits under the Interstate Commerce Act, the anti-trust acts, the postal laws, etc.

IV. The Circuit Court of Appeals.

§ 36. Organization.

Under the Judiciary Act appeals lay in certain cases from the District to the Circuit Courts and from both of these courts to the Supreme Court. By increasing the number of inferior courts it was easy for Congress to provide for the increase in judicial business, but with such increase in the number of inferior courts followed a corresponding increase in the amount of the appellate business of the Supreme Court, which was the court of last resort. The consequence was that the Supreme Court was overwhelmed with the number of appeals taken, and was not able to dispose of them with reasonable promptness, it taking about four years to hear a case appealed from the Circuit Court. To meet this situation Congress established by the act of March 3, 1891, known as Evarts Act, nine Circuit Courts of Appeals, there being one for each circuit. The statute took away the appellate jurisdiction of the Circuit Court and transferred much of the appellate jurisdiction of the Supreme Court to the new Courts of Appeals, it being supposed that this would effectually relieve the Supreme Court.[24]

The court consists of three judges of whom two constitute a quorum. The circuit justices (justices of the Supreme Court), the circuit judges and district judges (in the absence of the

[24]For text of the act, see 26 Stat. L. 826; 4 Fed. St. Ann. 395; 31 C. C. A. XXIX; 90 Fed. XXIX; 150 Fed. V.

circuit justice or judge) within each circuit are competent to sit as judges. No justice or judge may sit in the Circuit Court of Appeals in any case tried before him as judge of a District or Circuit Court. This may make necessary the presence of a district judge in a case appealed from a circuit judge. The court is usually held by three circuit judges or by two circuit judges and one district judge. The opinion is frequently written by a district judge. The Circuit Court of Appeals presents the anomoly of a court without judges of its own, the court being held by judges of other courts, there being no regular judges of the Circuit Courts of Appeals. The Evarts Act provides for the appointment of an additional circuit judge for each circuit to meet the demand for judges of the Circuit Courts of Appeals.

The terms of the Circuit Courts of Appeals are provided for by law. The courts sit at follows: *First Circuit,* at Boston; *Second Circuit,* at New York; *Third Circuit,* at Philadelphia; *Fourth Circuit,* at Richmond; *Fifth Circuit,* at New Orleans, Atlanta, and Fort Worth; *Sixth Circuit,* at Cincinnati; *Seventh Circuit,* at Chicago; *Eighth Circuit,* at St. Louis, Denver (or Cheyenne), and St. Paul; *Ninth Circuit,* at San Francisco, and in two other places to be designated by the court; "And in such other places in each of the above circuits as said court may from time to time designate."[25]

§ 37. Jurisdiction—In General.

The jurisdiction of the Circuit Court of Appeals is exclusively appellate. Appeals lie from both the District and Circuit Courts. In some cases the jurisdiction is final, and in others an appeal lies from the Circuit Court of Appeals to the Supreme Court. The jurisdiction of the court does not depend upon the amount in controversy. The statute provides that an appeal may be taken from the District or Circuit Courts direct

[25] 4 Fed. St. Ann. 689-692.

to the Supreme Court in certain enumerated cases.[26] In all other cases, "unless otherwise provided by law," the Circuit Court of Appeals has appellate jurisdiction to review final decisions of the District or Circuit Courts.

The full text of Section 6 of the statute, which defines the jurisdiction of the court, is as follows:

"That the circuit courts of appeals established by this act shall exercise appellate jurisdiction to review by appeal or by writ of error final decision in the district court and the existing circuit courts in all cases other than those provided for in the preceding section of this act,[27] unless otherwise provided by law, and the judgments or decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different states; also in all cases arising under the patent laws, under the revenue laws, and under the criminal laws and in admiralty cases, excepting that in every such subject within its appellate jurisdiction the circuit court of appeals at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision. And thereupon the Supreme Court may either give its instruction on the questions and propositions certified to it, which shall be binding upon the circuit courts of appeals in such case, or it may require that the whole record and cause may be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal.

"And excepting also that in any such case as is hereinbefore made final in the circuit court of appeals it shall be competent for the Supreme Court to require, by certiorari or otherwise,

[26]See post, § 45.

[27]Providing for appeals from the District and Circuit Courts direct to Supreme Court in certain cases.

any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court.

"In all cases not hereinbefore, in this section, made final there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars besides costs. But no such appeal shall be taken or writ of error sued out unless within one year after the entry of the order, judgment, or decree sought to be reviewed."[28]

Appeals from Territorial Courts.—Appellate jurisdiction is also given over the supreme courts of the territories in cases in which the judgments of the Circuit Court of Appeals are made final by the act, and for this purpose, the territories are assigned by the Supreme Court of the United States to particular circuits (Section 15).

§ 38. Final Jurisdiction.

It will be noted that the jurisdiction of the Circuit Court of Appeals is made final in all

(1) Cases in which jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States, or citizens of different states;

(2) Cases arising under the patent laws;

(3) Cases arising under the revenue laws;

(4) Cases arising under the criminal laws;

(5) Admiralty cases.

The object of making the jurisdiction of the Circuit Court of Appeals final in the above cases is to prevent such cases from going to the Supreme Court, for the relief of which the Courts of Appeals were established. Nevertheless, the finality of the decisions of the Circuit Court of Appeals is qualified by the

[28]For annotations of this section, see 4 Fed. St. Ann. 409-422.

provision for review by the Supreme Court upon certification of questions or on *certiorari*.[29]

§ 39. Appeals from Interlocutory Orders or Decrees.

By Section 7 of the act, as amended in 1906, it is provided "That where, upon a hearing in equity in a District or in a Circuit Court, or by a judge thereof in vacation, an injunction shall be granted or continued, or a receiver appointed by an interlocutory order or decree, in any cause an appeal may be taken from such interlocutory order or decree granting or continuing such injunction, or appointing such receiver, to the Circuit Court of Appeals; *Provided,* that the appeal must be taken within thirty days from entry of such order or decree, and it shall take precedence in the appellate court; and the proceedings in other respects in the court below shall not be stayed unless otherwise ordered by that court, or by the appellate court, or a judge thereof, during the pendency of such appeal: *Provided further,* that the court below may, in its discretion, require as a condition of the appeal an additional bond."[30]

§ 40. Procedure.

All appeals must be taken or writs of error sued out within six months after the entry of the order, judgment or decree sought to be reviewed, unless a lesser time be limited by law in a given case. Existing provisions of law regulating the methods and systems of review, including all provisions relating to bonds, etc., regulate appeals, etc., to the Circuit Court of Appeals. And the judges of this court have the same powers and duties as to the allowance of appeals and writs of error as the justices or judges of the existing courts (Section 11). "Whenever on appeal or writ of error or otherwise a case coming from a District or Circuit Court shall be reviewed and determined

[29]See post, § 46.

[30]34 Stat. L. 116, Supp. (1909) Fed. St. Ann. 291.

in the Circuit Court of Appeals in a case in which the decision in the Circuit Court of Appeals is final, such cause shall be remanded to the said District or Circuit Court for further proceedings to be there taken in pursuance of such determination." (Section 10.)

V. The Supreme Court.

§ 41. Organization.

The Constitution provides that there shall be one Supreme Court, but does not prescribe the details of its organization, this matter being left to Congress. As originally constituted by the Judiciary Act, the Supreme Court consisted of the Chief Justice and five Associate Justices. At present (and since 1869) the court consists of the Chief Justice and eight Associate Justices, any six of whom constitute a quorum. It will be remembered that the members of the Supreme Court also serve as circuit justices. It is to be noted that the Supreme Court is the only court established by the Constitution itself, the other federal courts being established by Congress.

There is one regular term of the court annually, which commences on the second Monday in October.[31]

§ 42. Jurisdiction—In General.

The first section of Article III of the Constitution provides that "The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish." The first clause of the second section enumerates the cases to which the judicial power shall extend, and the second clause provides that, "In all cases affecting ambassadors, other public min-

[31]The first term of the court was held in New York, then the seat of the Federal Government, in February, 1790. There were no litigants until the August term, 1791, the first reported case being West *v.* Barnes, 2 Dall. 401.

isters and consuls, and those in which a state shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned the Supreme Court shall have appellate jurisdiction both as to law and fact, with such exceptions, and under such regulations, as the Congress shall make." This second clause does not profess to confer any jurisdiction upon the Supreme Court, but simply to distribute the jurisdiction conferred and defined by the preceding clauses. The original and appellate jurisdiction thus distributed extends only to cases within the federal judicial power as already defined.[32]

§ 43. Original Jurisdiction.

In the section of the Constitution just quoted it is provided that "In all cases affecting ambassadors, other public ministers and consuls, and those in which a state is a party, the Supreme Court shall have original jurisdiction."[33] There are therefore, two classes of cases to which the original jurisdiction of the Supreme Court extends. No cases affecting ambassadors, etc., have yet been brought in the Supreme Court,[34] and hence only cases in which a state is a party have been of practical importance. Many such cases have been brought originally in the Supreme Court, most of these being suits between two states.[35] The jurisdiction includes also suits between the United States and a state,[36] and suits by a state against a citizen of another state,[37] but not against one of its own citizens, since such suits are not within the federal

[32]Pennsylvania *v.* Quicksilver Co., 10 Wall. 553.

[33]Art. II, § 2. See annotations in 9 Fed. St. Ann. 117-123.

[34]See, in this connection, United States *v.* Ortega, 11 Wheat. 467; In re Baiz, 135 U. S. 403.

[35]See ante, § 15.

[36]United States *v.* Texas, 143 U. S. 621.

[37]Florida *v.* Anderson, 91 U. S. 667. For limitations on this jurisdiction, see Wisconsin *v.* Pelican Ins. Co., 127 U. S. 265.

judicial power,[38] nor, since the Eleventh Amendment, suits against a state by a citizen of another state. The original jurisdiction of the court is not dependent upon the amount in controversy, nor upon the subject matter of the suit.

Congress can neither enlarge nor restrict the original jurisdiction conferred by this section; but it can make that jurisdiction exclusive, or vest it concurrently in the inferior federal courts.[39] Congress has provided that "The Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a state is a party, except between a state and its citizens or between a state and citizens of other states or aliens, in which latter cases it shall have original, but not exclusive jurisdiction. And it shall have exclusively all such jurisdiction of suits or proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, as a court of law can have consistently with the law of nations, and original, but not exclusive, jurisdiction of all suits brought by ambassadors, or other public ministers, or in which a consul or vice-consul is a party."[40]

Congress may prescribe the mode of procedure in cases brought originally in the Supreme Court, but in the absence of any legislation by Congress on the subject, the court may make its own rules.[41]

The Supreme Court may issue the writ of *habeas corpus* in aid of its original jurisdiction.[42]

§ 44. Appellate Jurisdiction—In General.

The Supreme Court derives its importance chiefly from its

[38]Pennsylvania *v.* Quicksilver Co., 10 Wall. 553.

[39]Marbury *v.* Madison, 1 Cranch 137; Cohens *v.* Virginia, 6 Wheat. 264; Ames *v.* Kansas, 111 U. S. 449.

[40]Rev. St., § 687, 4 Fed. St. Ann. 436.

[41]Florida *v.* Georgia, 17 How. 478. See also, Kentucky *v.* Dennison, 24 How. 66.

[42]See Rev. St., § 751, 3 Fed. St. Ann. 163; Ex parte Hung Hang, 108 U. S. 552.

appellate jurisdiction. The Constitution provides (continuing last quoted section) that, "In all other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make."[43]

By this provision the appellate jurisdiction of the Supreme Court is placed wholly under the control of Congress, and the Supreme Court can exercise no appellate jurisdiction except in the cases, and in the manner and form defined and prescribed by Congress.[44] Congress may even take away the jurisdiction of the court in a pending cause, and thus prevent a decision therein.

A notable instance of the exercise of this power is found in the action of Congress in connection with the McCardle case brought to test the validity of the Reconstruction Act of March 7, 1867. The case first reached the Supreme Court in the December, 1867, term on a motion to dismiss, for want of jurisdiction, an appeal from the Circuit Court for the district of Mississippi. By the judgment of the Circuit Court McCardle was held by the military authorities for a violation of the reconstruction act. The Supreme Court denied the motion to dismiss the appeal, holding that it had jurisdiction under the existing law.[45] The case was then argued on the merits and taken under advisement, but before a decision was reached, Congress, by act passed March 27, 1868, over the President's veto, repealed the act conferring jurisdiction of such cases.[46] The case having been continued until the next term for decision on the merits, it was then dismissed by the Supreme Court on the ground that the jurisdiction of the court had been taken away by the act of Congress.[47] Thus

[43]Art. II, § 2.

[44]American Construction Co. *v.* Jacksonville, etc., R. Co., 148 U. S. 372.

[45]Ex parte McCardle, 6 Wall. 318.

[46]15 Stat. L. 44.

[47]Ex parte McCardle, 7 Wall. 506.

Congress prevented a possible decision that the reconstruction act was unconstitutional.

§ 45. Same—Appeals from District and Circuit Courts.

The act of 1891 establishing the Circuit Courts of Appeals did not entirely take away the jurisdiction of the Supreme Court to review the decisions of the District and Circuit Courts, but provided for such review in several cases of special importance. Section 5 of the act provides "That appeals or writs of error may be taken from the District Courts or from the existing Circuit Courts direct to the Supreme Court in the following cases:

[1] In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision.

[2] From the final sentences and decrees in prize cases.

[3] In cases of conviction of a capital crime [as amended in 1897 by the omission of the words "or otherwise infamous"].

[4] In any case that involves the construction or application of the Constitution of the United States.

[5] In any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question.

[6] In any case in which the constitution or law of a state is claimed to be in contravention of the Constitution of the United States."[48]

As the object of establishing the Circuit Courts of Appeals was to lighten the work of the Supreme Court, the propriety of limiting the right of appeal from the District and Circuit

[48]For cases decided under this section, see the annotations in 4 Fed. St. Ann. 399-408.

Courts directly to the Supreme Court to a few important cases, is obvious. At the same time, the importance of the cases enumerated above makes desirable this right of direct appeal in these cases.

Under Other Acts there are some further cases in which direct appeals are allowed to the Supreme Court, notably cases arising under the anti-trust act.[49]

§ 46. Same—Appeals from Circuit Courts of Appeals.

The act establishing the Circuit Courts of Appeals provides for taking cases in these courts to the Supreme Court as set out in Section 6 of the Act. There are three methods of review: (1) on certificate from the Circuit Court of Appeals; (2) on certiorari from the Supreme Court; and (3) by appeal or writ of error.[50]

1. *Review on Certificate from Circuit Court of Appeals.*—After defining the jurisdiction of the Circuit Courts of Appeals, the section provides that "in every such subject within its appellate jurisdiction the Circuit Court of Appeals may certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision. And thereupon the Supreme Court may either give its instruction on the questions and propositions certified to it, which shall be binding upon the Circuit Courts of Appeals in such case, or it may require that the whole record and cause be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal."[51]

It is not entirely clear from the language of this section whether this mode of review applies only to cases in which

[49]See Northern Securities Co. *v.* United States, 193 U. S. 197.

[50]For cases under this section, see annotations in 4 Fed. St. Ann. 409-422.

[51]See Warner *v.* New Orleans, 167 U. S. 467.

the jurisdiction of the Circuit Courts of Appeals is made final or to all cases within their jurisdiction.

2. *Review on Certiorari from Supreme Court.*—The act further provides that "in any such case as is hereinbefore made final in the Circuit Court of Appeals it shall be competent for the Supreme Court to require by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court."

It is held that this power should be sparingly exercised by the Supreme Court, and only when the importance of the question involved, the necessity of avoiding conflict between two or more Circuit Courts of Appeals, or other important reason demands its exercise.[52] The power has been exercised, however, in a considerable number of cases.[53]

The writ is ordinarily issued only after final decree of the Circuit Court of Appeals, but it may be issued before decree if the Supreme Court be of opinion that an earlier interference is necessary.[54]

3. *Review by Appeal or Writ of Error.*—The act further provides that "In all cases not hereinbefore, in this section, made final there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars besides costs. But no such appeal shall be taken or writ of error sued out unless within one year after the entry of the order, judgment, or decree sought to be reviewed."

Under the Bankruptcy Act (§ 25), appeals may be taken from the Circuit Courts of Appeals to the Supreme Court in certain cases.

[52]Forsyth *v.* Hammond, 166 U. S. 506.

[53]See numerous cases cited in 22 Enc. Pl. & Pr. 320.

[54]American Construction Co. *v.* Jacksonville, etc., R. Co., 148 U. S. 372; The Conqueror, 166 U. S. 110.

§ 47. Same—Appeals from Other Federal and Congressional Courts.

The Supreme Court is given jurisdiction to review by appeal or writ of error the decisions of various courts established by Congress in addition to those above mentioned. Where the court is not established under the article defining the judicial power but under some other provision of the Constitution, e. g., the territorial courts, it would seem that the jurisdiction of the Supreme Court must be derived from the act of Congress, rather than from the grant of judicial power in Article III of the Constitution, though the point does not seem to have been considered by the Supreme Court.

Court of Claims.—It is provided that "An appeal to the Supreme Court shall be allowed, on behalf of the United States, from all judgments of the Court of Claims adverse to the United States, and on behalf of the plaintiff in any case where the amount in controversy exceeds three thousand dollars, or where his claim is forfeited to the United States by the judgment of said court, as provided in section one thousand and eighty nine."[55] "All appeals from the Court of Claims shall be taken within ninety days after the judgment is rendered, and shall be allowed under such regulations as the Supreme Court may direct."[56]

Courts of the District of Columbia.—By the act of February 9, 1893, establishing the court of appeals of the District of Columbia, the Supreme Court is given jurisdiction to review the judgments and decrees of said court of appeals in cases involving over $5,000, the pecuniary limit, however, not applying to cases involving the validity of any patent or copyright, or in which is drawn in question the validity of a treaty or statute of, or an authority exercised under the United

[55]Rev. St., § 707, 4 Fed. St. Ann. 467. The reference to § 1089 seems intended for § 1086.

[56]Rev. St. § 708, 4 Fed. St. Ann. 467.

States.[57] By an act of March 3, 1897, the Supreme Court is authorized to issue writs of certiorari to the court of appeals of the District in the same cases and manner as in the case of the Circuit Courts of Appeals.[58]

Territorial or Insular Courts.—The Supreme Court may review on appeal or on writ of error the decrees or judgments of the supreme courts of the territories where the amount in dispute, exclusive of costs, exceeds five thousand dollars.[59] The Supreme Court also has jurisdiction, in certain cases, to review the decisions of the supreme courts of Hawaii,[60] the Philippines,[61] and Porto Rico.[62]

Court of Private Land Claims.—Appeals from this court were allowed when the court was in existence.[63]

§ 48. Writ of Error to State Courts—The Statute.

One of the most important branches of the appellate jurisdiction of the Supreme Court is its jurisdiction to review the decisions of the courts of the states. This jurisdiction is conferred by the twenty-fifth section of the Judiciary Act of 1789. This carefully drawn statute is so framed as to authorize the minimum amount of interference by the Supreme Court with the decisions of the state courts consistent with the proper maintenance of the supremacy of the Constitution, laws, and

[57]27 Stat. L. 436, 4 Fed. St. Ann. 466. Under former statutes the Supreme Court had similar jurisdiction of appeals from the supreme court of the District of Columbia. See 4 Fed. St. Ann. 463.

[58]29 Stat. L. 692, 4 Fed. St. Ann. 466.

[59]Rev. St. § 702, 23 Stat. L. 443, 4 Fed. St. Ann. 459, 463. By Sec. 15 of the Act of 1891 the Circuit Court of Appeals also had jurisdiction in certain cases to review judgments and decrees of territorial courts. Except in the cases covered by that section, the act of 1891 does not affect the appellate jurisdiction of the Supreme Court from the territorial courts. See Simms *v.* Simms, 175 U. S. 162.

[60]Colton *v.* Hawaii, 211 U. S. 162.

[61]32 Stat. L. 695, 5 Fed. St. Ann. 722. See post, § 56.

[62]Garzot *v.* Rubio, 209 U. S. 283.

[63]26 Stat. L. 858, 6 Fed. St. Ann. 55.

treaties of the United States. The text of the statute as it now stands is as follows:

"A final judgment or decree in any suit in the highest court of a state, in which a decision in the suit could be had,

[1] "Where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or

[2] "Where is drawn in question the validity of a statute of or an authority exercised under any state, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or

[3] "Where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege or immunity specially set up or claimed by either party, under such Constitution, treaty, statute, commission, or authority,

"May be re-examined and reversed or affirmed in the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States.

"The Supreme Court may reverse, modify, or affirm the judgment or decree of such state court, and may, at their discretion, award execution, or remand the same to the court from which it was removed by the writ."[64]

The constitutionality of this section was strenuously contested in an early case. In 1813 the Supreme Court reversed the Judgment of the Court of Appeals of Virginia in an action of ejectment, and directed the state court to enter judgment in accordance with the opinion of the Supreme Court. The Court of Appeals refused to obey the mandate of the Supreme Court,

[64]Rev. St. § 709, 4 Fed. St. Ann. 467. For exhaustive annotations upon this section, see 4 Fed. St. Ann. 468-490.

on the ground that the Constitution does not extend the federal judicial power to the review by the Supreme Court of the decisions of the state courts, and that the statute authorizing such review was unconstitutional. This decision of the Virginia court was reversed in 1816 by the Supreme Court and the act was sustained as constitutional.[65] The Supreme Court declined to attempt to compel the Virginia court to obey its mandate, but, by its own officer, put the party prevailing under its decision in possession of the premises.[66] The constitutionality of this section has since been reaffirmed and is fully established.[67]

The jurisdiction of the Supreme Court under this section was not affected by the act establishing the Circuit Courts of Appeals, section 5 of that act expressly providing that "Nothing in this act shall affect the jurisdiction of the Supreme Court in cases appealed from the highest court of a state, nor the construction of the statute providing for review of such cases."

§ 49. Same—Analysis of Statute.

Upon an analysis of the statute it will be observed that:

(1) The decision of the state court must be *final.*

(2) The decision may be a judgment *at law* or decree *in equity.*

(3) The decision must be of the *highest court* of the state having jurisdiction of the suit, though this need not necessarily be the highest state court.

(4) The statute provides for review only of decisions in *cases involving a federal question,* and not those of diverse citi-

[65]Hunter *v.* Fairfax's Devisee, 1 Munf. (Va.) 218; Fairfax's Devisee *v.* Hunter, 7 Cranch 603; Hunter *v.* Martin, Devisee of Fairfax, 4 Munf. (Va. 1); Martin *v.* Hunter, 1 Wheat. 304.

[66]Tucker, Const. 766.

[67]Cohens *v.* Virginia, 6 Wheat. 264; Williams *v.* Bruffy, 102 U. S. 248.

zenship, etc. The cases reviewable are cases of conflicting state and federal authority.

(5) The pecuniary amount involved is immaterial.

(6) The right of review extends to criminal as well as to civil cases.[68]

(7) The *validity* not merely the *construction* of the statute, etc., must be drawn in question; merely controverting a right under a statute, etc., or disputing an act done by an authority, etc., is not drawing in question the validity of the statute, authority, etc.

(8) The decision of the state courts must be *adverse to the federal government.* If favorable thereto it cannot be reviewed. That is to say, the *federal* law, etc., must have been declared by the state court to be *invalid,* or the decision must have been *against* the title, etc., claimed under the federal authority; or the *state* law, etc., must have been held *valid* as against an objection that it conflicts with the federal law. If the state court upholds the federal law or authority, or declares the state law repugnant to the constitution or laws of the United States, its decisions cannot be reviewed by the Supreme Court.

(9) The Supreme Court can review by writ of error only and not by appeal, and hence the power of review extends to questions of law only and not of fact. This applies to equity cases as well as to cases at law.

§ 50. Same—Practice as to Award of Writ.

"A writ of error to a state court is not allowed as a matter

[68] Twitchell *v.* Com., 7 Wall. 321. Rev. St., § 710, provides that "Cases on writ of error to revise the judgment of a state court in any criminal case shall have precedence on the docket of the Supreme Court of all cases to which the government of the United States is not a party, excepting only such cases as the court, in its discretion, may decide to be of public importance." 4 Fed. St. Ann. 490.

of right. The practice is to submit the record of the state court to a justice of the Supreme Court, whose duty it is to ascertain upon examination whether the case upon the face of the record will justify the allowance of the writ. He may refer the application to the whole court as to the propriety of the issue of the writ. The Supreme Court will consider no application for the writ of error, unless a justice of the court has endorsed on the record a request that the application be made to the full bench. The writ will be denied if there is no federal question involved, or if the decision complained of was, as regards the federal question, so plainly right as not to require argument. The application for a writ of error, if made to a single judge, is usually *ex parte*. When made to the full court, usually both sides are heard."[69]

To furnish a basis for the writ of error, the federal question involved must have been distinctly raised in the state court and have been decided therein, and these facts must appear from the record. As declared by the Supreme Court, "It is well settled by a long series of adjudications that to give this court jurisdiction by writ of error to a state court, it must appear affirmatively, not only that a federal question was presented for decision to the highest court of the state having jurisdiction, but that its decision was necessary to the determination of the case, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it."[70]

§ 51. Same—Rule Where Other than Federal Questions Are Involved.

On the whole it seems that the Supreme Court is careful not to interfere with the decisions of the state courts, except when clearly proper, such interference being a somewhat delicate proceeding. When, therefore, it appears from the record that the

[69] 2 Foster Fed. Prac. (2nd ed.), § 477.

[70] Wood Mowing, etc., Co., *v.* Skinner, 139 U. S. 293.

adverse decision of the state court may have been based on either of two independent grounds, one of which is not a federal question, the Supreme Court will dismiss the writ of error, assuming that the decision was based on the nonfederal ground, unless this is so palpably insufficient that it cannot be presumed that the state court based its decision upon it. In the latter case, the Supreme Court will assume that the state court decided on the federal ground only, and will review the decision.[71]

§ 52. Review by Prohibition, Habeas Corpus.

The Supreme Court has power to exercise jurisdiction in its nature appellate by means of the writs of prohibition, certiorari, mandamus and habeas corpus, directed to the inferior federal courts.[72]

VI. Courts of Special Jurisdiction.

§ 53. The Court of Claims.

Formerly any person having a claim against the United States had no remedy but to petition Congress for relief. Such claims are now prosecuted in the Court of Claims, a special court established in 1855 to take jurisdiction of claims against the government. The court consists of a chief justice and four associate justices, who are appointed by the President, by and with the advice and consent of the Senate, and hold office during good behavior. The court sits at Washington.

The claims enforceable in this court are designated by statute, and, to the extent prescribed, the United States has consented to be sued in this court. The procedure also is prescribed by statute. Appeals lie to the Supreme Court.[73]

[71] 2 Foster Fed. Prac. (2nd ed.), § 477; Bonner *v.* Gorman, 213 U. S. 86.

[72] 2 Foster Fed. Prac. (2nd ed.), sec. 475; 4 Fed. St. Ann. 439, 498; Ex parte Virginia, 100 U. S. 339.

[73] 2 Fed. St. Ann. 53-101.

§ 54. The Court of Customs Appeals.

The United States Court of Customs Appeals was created by § 29 of the Tariff Act of August 5, 1909. The court consists of a presiding judge and four associate judges appointed by the President, by and with the advice and consent of the senate, each of whom receives a salary of $10,000 per annum. Any three members constitute a quorum, and the concurrence of three members is necessary to any decision. The court sits at Washington, and is required to be always open for the transaction of business, "and the sessions thereof may, in the discretion of the court, be held by the said court in the several judicial circuits, and at such places as said court may from time to time designate."

The statute provides that "The Court of Customs Appeals established by this act shall exercise exclusive appellate jurisdiction to review by appeal, as provided by this act, final decisions by a board of general appraisers in all cases as to the construction of the law and the facts respecting the classification of merchandise and the rate of duty imposed thereon under such classification, and the fees and charges connected therewith, and all appealable questions as to the jurisdiction of said board, and all appealable questions as to the laws and regulations governing the collection of customs revenues; and the judgment or decrees of said Court of Customs Appeals shall be final in all cases."[74]

VII. Miscellaneous Courts and Quasi-Courts.

§ 55. Courts of the District of Columbia.

The courts of the District of Columbia are established by Congress under its power to exercise exclusive legislation over the District. They are courts of the United States[75] though it would seem that they do not belong to the federal judicial sys-

[74]Supp. (1909) Fed. St. Ann. 821-824.
[75]Embry *v.* Palmer, 107 U. S. 3.

tem, being established by Congress under its power to legislate for the District rather than under its power "to constitute tribunals inferior to the Supreme Court." There seems to be no more reason, however, to regard them as courts of the United States than so to consider the territorial courts established by Congress under its power to legislate for the territories, except that the Constitution expressly provides for the District, while the territories were probably not contemplated at the time the Constitution was adopted, and the territorial form of government is temporary while that of the District of Columbia is permanent. In regard to the jurisdiction that may be conferred by Congress upon them, there seems to be no distinction between the territorial courts and those of the District. In neither case need it be confined to the federal judicial power as defined by the Constitution.

Under the new Code of 1901 the judicial power is vested in the Supreme Court of the United States, the Court of Appeals of the District of Columbia, the Supreme Court of the District of Columbia, and the inferior courts, namely the justice courts and police courts. The Supreme Court of the District (which was established in 1893) possesses the same powers and exercises the same jurisdiction as the Circuit and District Courts of the United States, besides the jurisdiction exercised by the Supreme Court at the date of the passage of the Code of 1901. The Court of Appeals of the District has appellate jurisdiction over the decisions of the Supreme Court and inferior tribunals. The Supreme Court of the United States has appellate jurisdiction, in certain cases, to review the decisions of the Court of Appeals.[76]

§ 56. Territorial and Insular Courts.

The provisions of the Constitution relating to the judicial power do not apply to the territories, but Congress under its

[76]See Code of District of Columbia; also 12 Cyc. of L. & P. 961-966.

general power to legislate for the territories has established courts in each of the territories, which are not courts of the United States under the Constitution, but "congressional courts."[77] The judges are appointed by the president and hold office for limited terms. For judicial purposes, the territories are attached to adjacent circuits, and appeals may be taken from the territorial supreme courts to the Circuit Court of Appeals and the Supreme Court. Of course, territorial courts cease to exist as such upon the admission of the territory as a state.[78]

District courts with the jurisdiction of the Circuit and District Courts of the United States have been established for *Alaska*,[79] the *Territory of Hawaii*,[80] and *Porto Rico*.[81]

Philippine Islands.—The courts of the Philippine Islands consist of the Supreme Court and the "courts of first instance." The chief justice and associate justices of the Supreme Court are appointed by the President, by and with the advice and consent of the Senate. The judges of the courts of first instance are appointed by the civil government, by and with the advice and consent of the Philippine Commission. The Supreme Court of the United States has power to review the judgments and decrees of the Supreme Court of the Philippine Islands in all cases "in which the Constitution or any statute, treaty, title, right, or privilege of the United States is involved, or in causes in which the value in controversy exceeds twenty-five thousand dollars, or in which the title or possession of real estate exceeding in value the sum of twenty-five thousand dollars * * * is involved or brought in question."[82]

[77]American Ins. Co. *v.* Canter, 1 Pet. 511; McAllister *v.* United States, 141 U. S. 170.

[78]See 7 Fed. St. Ann. 222-244.

[79]1 Fed. St. Ann. 23; Supp. (1909) Fed. St. Ann. 36. The district court of Alaska is not a court of the United States. McAllister *v.* United States, 141 U. S. 170.

[80]3 Fed. St. Ann. 206; Supp. (1909) Fed. St. Ann. 152.

[81]5 Fed. St. Ann. 773.

[82]Act of 1902, §§ 9, 10 (32 Stat. L. 695, 5 Fed. St. Ann. 722).

§ 57. The Court of Private Land Claims.

This court was established in 1891 for the settlement of disputes as to certain private titles to land claimed under Spanish and Mexican grants in Arizona, Colorado, Nevada, New Mexico, Utah and Wyoming. The court sat in these states and territories. The judges held office for four years, and the court was not regarded as a part of the regular federal system. It ceased to exist in 1904, when the powers of the court were transferred to the commissioner of the general land office. Appeals lay to the Supreme Court.[83]

§ 58. Consular Courts—United States Court for China.

Consular courts, held by United States consuls, are established by the United States in several eastern countries under treaties with the countries in which such courts are held. They exercise civil and criminal jurisdiction in matters affecting citizens of the United States.[84]

United States Court for China.—A court known as the "United States Court for China" was established by an act of June 30, 1906. The court is held by a single judge appointed by the President, by and with the advice and consent of the senate, who receives a salary of $8,000 per annum. He holds office for ten years, "unless sooner removed by the President for cause." The court sits at Shanghai, Canton, and other places.

The act provides that the court "shall have exclusive jurisdiction in all cases and judicial proceedings whereof jurisdiction may now be exercised by United States consuls and ministers by law and by virtue of treaties between the United States and China, except in so far as said jurisdiction is qualified by section two of this act," which section continues the jurisdiction

[83]6 Fed. St. Ann. 48. See also, 35 Stat. L. 655, Supp. (1909) Fed. St. Ann. 530.

[84]Rev. St., § 4083, et seq.; 2 Fed. St. Ann. 819-830; 7 Am. & Eng. Enc. L. 17-21.

of consuls in minor cases. The court exercises appellate and supervisory control over the consular courts. "The jurisdiction of said United States Court, both original and on appeal, in civil and criminal matters, and also the jurisdiction of the consular courts in China, shall in all cases be exercised in conformity with said treaties and the laws of the United States now in force in reference to the American consular courts in China, and all judgments and decisions of said consular courts, and all decisions, judgments, and decrees of said United States Court shall be enforced in accordance with said treaties and laws. But in all cases when such laws are deficient in the provisions necessary to give jurisdiction or to furnish suitable remedies, the common law and the law as established by the decisions of the courts of the United States shall be applied by said court in its decisions and shall govern the same subject to the terms of any treaties between the United States and China."

Appeals lie from the Court for China to the United States Circuit Court of Appeals for the Ninth Circuit, subject to review by the Supreme Court of the decisions of the Circuit Court of Appeals on such appeals in the same classes of cases as in cases coming to the Circuit Court of Appeals from the District and Circuit Courts.[85]

§ 59. The Department of Justice.

Congress has established an executive department known as the Department of Justice, of which the attorney-general is the head. The attorney-general is the legal adviser to the President and heads of the executive departments, who may require his opinion on matters of law. Such opinions are to be regarded as law by administrative officers until withdrawn by the attorney-general or overruled by the courts. The opinions of the attorney-general are published, and are occasionally cited

[85]34 Stat. L. 814; Supp. (1909) Fed. St. Ann. 294; Biddle *v.* United States, 156 Fed. 759; Toeg *v.* Suffert, 167 Fed. 125.

by the courts. The attorney-general is also the attorney for the United States in suits in which the government is interested.[86]

§ 60. The General Land Office.

In connection with the management and sale of the public lands Congress has established a land department known as the General Land Office, which is a branch of the Department of the Interior. The office is in charge of a commissioner who is under the Secretary of the Interior. The department is a special tribunal vested with judicial power to decide questions relating to lands acquired from the government. Its decisions are published and have some weight with the courts.[87]

§ 61. The Interstate Commerce Commission.

By the Interstate Commerce Act of 1887 a commission was created to enforce the provisions of the act. This commission is an administrative board exercising administrative powers. It is not a court and has no judicial or legislative powers. Nevertheless it exercises a *quasi* judicial power, and its published decisions have some weight as to matters of law involved. The commission is composed of five commissioners.[88]

§ 62. Military Courts.

The military law of the United States recognizes several military courts, chiefly of criminal jurisdiction.

None of these courts belong to the judicial system of the United States, but are established under the military power and

[86]Rev. St., §§ 346-387; 4 Fed. St. Ann. 762-773.

[87]6 Fed. St. Ann. 210; 26 Am. & Eng. Enc. L. 374. The decisions of the Land Department in questions of fact are conclusive upon the courts. Whitcomb *v.* White, 214 U. S. 15.

[88]3 Fed. St. Ann. 837; 17 Am. & Eng. Enc. L. 124, et seq.

not under the judicial power conferred by the Constitution.[89] These courts are:

1. *Courts-Martial.*—Courts-martial are special tribunals organized during times of peace or war for the trial of persons in the military or naval service, charged with military offenses. These courts are temporary, a special court being organized for the trial of each offense. The civil courts cannot review the decisions of courts-martial, but on *habeas corpus* proceedings can always inquire into the question of jurisdiction, and order the discharge of persons not subject to the jurisdiction of the court-martial.

Courts-martial are also organized under state authority in connection with the militia.

2. *Courts of Inquiry.*—A court of inquiry is not a regular court for the trial of an offense, but rather an investigating tribunal charged with the quasi-judicial function of inquiring into charges against persons in the military or naval service. Courts of inquiry are sometimes held upon the application of the person charged. The object of the investigation is generally to determine whether the charge is sufficient to warrant trial by court-martial.

3. *Military Commissions.*—These are war courts, organized only at a time and place of war or martial law for the trial of criminal offenses by persons whether in the military service or not, where such cases do not come within the jurisdiction of a court-martial or cannot be tried by the regular municipal courts because their operations are obstructed.[90]

4. *Provisional Courts.*—Provisional courts exercising a general civil and criminal jurisdiction have also sometimes been

[89]See generally, as to military courts, the article on "Military Law" in 20 Am. & Eng. Enc. L. 615, 645-660.

[90]In re Vallandingham, 1 Wall. 243; Ex parte Milligan, 4 Wall. 2.

created by authority of the President as commander-in-chief, under conditions justifying the establishment of military commissions. The establishment of these courts is within the constitutional authority of the President. Provisional courts are established under the military power, and not under the judicial power, and do not belong to the judicial system of the United States.[91]

[91] The Grapeshot, 4 Wall. 129; Mechanic's, etc., Bank *v.* Union Bank, 22 Wall. 276. As to the provisional court for Porto Rico, see In re Vidal, 179 U. S. 126; Santiago *v.* Nogueras, 214 U. S. 260.

CHAPTER V.

REMOVAL OF CAUSE.

§ 63. From One Federal Court to Another.

Provision is made by statute for the removal of suits and processes from District to Circuit Courts,[1] and from one Circuit Court to another,[2] in a proper case, as for the disability or disqualification of the judge. Again, causes cognizable by federal courts may be removed from a territorial court to a federal District Court upon the admission of the territory into the Union.[3]

§ 64. From a State to a Federal Court—In General.

We have found that in many cases the jurisdiction of the federal and of the state courts is concurrent, and this even in cases involving a federal question. The suit may be brought in either the state or the federal court at the option of the plaintiff. But it is provided by statute that if a suit within the concurrent jurisdiction of the state and federal courts is brought in a state court, it may be removed in certain cases (generally by the defendant) to the Circuit Court. The general ground on which the cause may be removed may be either, (1) Because a federal question is involved on which the fed-

[1]Rev. St., §§ 587-589; 4 Fed. St. Ann. 674-5.
[2]Rev. St., § 615; 4 Fed. St. Ann. 244.
[3]Rev. St., §§ 567-569; 4 Fed. St. Ann. 237-8.

eral court ought to pass; or (2) Because prejudice or local influence is feared in the state court. This may presumably be more likely where the defendant is a non-resident of the state in which the suit is brought.

The right to remove is wholly statutory and can be exercised only in the cases and in the manner authorized by the statute. The right is given by Congress and cannot be impaired or taken away by state legislation.

There have been several statutes providing for the removal of causes from the state courts to the federal courts, the present law being found in the Act of March 3, 1875, as amended by the Act of March 3, 1887, re-enacted in corrected form August 13, 1888. This statute, although relating to a most important subject, and although it has been passed three times by Congress, is somewhat obscure in its language, and has been very often before the courts for construction.

The first section of the act defines the jurisdiction of the Circuit Court. The second section, which defines the right of removal, is as follows:[4]

"That any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the circuit courts of the United States are given original jurisdiction by the preceding section, which may now be pending, or which may hereafter be brought, in any State court, may be removed by the defendant or defendants therein to the circuit court of the United States for the proper district. Any other suit of a civil nature, at law or in equity, of which the circuit

[4]25 Stat. L. 434; 4 Fed. St. Ann. 312. For annotations, see 4 Fed. St. Ann. 312-349. For text of § 1 of this act, see ante, § 35. For general discussion of the removal acts, see Cochran *v.* Montgomery County, 199 U. S. 260. In this case the court said: "The main purpose of the act of 1887 was, as has been repeatedly said, to restrict the jurisdiction, and this was largely accomplished in the matter of removals by withholding the right from plaintiffs and only according it to defendants when sued in plaintiffs' district."

courts of the United States are given jurisdiction by the preceding section, and which are now pending, or which may hereafter be brought, in any State court, may be removed into the circuit court of the United States for the proper district by the defendant or defendants therein, being non-residents of that State. And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the circuit court of the United States for the proper district. And where a suit is now pending, or may be hereafter brought, in any State court, in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State, any defendant, being such citizen of another State, may remove such suit into the circuit court of the United States for the proper district, at any time before the trial thereof, when it shall be made to appear to said circuit court that from prejudice or local influence he will not be able to obtain justice in such State court, or in any other State court to which the said defendant may, under the laws of the State, have the right, on account of such prejudice or local influence, to remove said cause: *Provided,* That if it further appear that said suit can be fully and justly determined as to the other defendants in the State court, without being affected by such prejudice or local influence, and that no party to the suit will be prejudiced by a separation of the parties, said circuit court may direct the suit to be remanded, so far as relates to such other defendants, to the State court, to be proceeded with therein.

"At any time before the trial of any suit which is now pending in any circuit court or may hereafter be entered therein, and which has been removed to said court from a State court on the affidavit of any party plaintiff that he had reason to believe and did believe that, from prejudice or local influence,

he was unable to obtain justice in said State court, the circuit court shall, on application of the other party, examine into the truth of said affidavit and the grounds thereof, and, unless it shall appear to the satisfaction of said court that said party will not be able to obtain justice in such State court, it shall cause the same to be remanded thereto.

"Whenever any cause shall be removed from any State court into any circuit court of the United States, and the circuit court shall decide that the cause was improperly removed, and order the same to be remanded to the State court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the circuit court so remanding such cause shall be allowed."

§ 65. What Suits May Be Removed—In General.

All important cases which may be removed are enumerated in the section above set forth, though under other acts removal may be had in several uncommon or unimportant cases.[5]

In general, only those suits can be removed to the Circuit Court of which that court is given original jurisdiction, that is, suits which could, in the first instance, have been brought in that court.[6]

By the first two clauses of this section all suits of a civil nature of which the Circuit Courts are given jurisdiction under the preceding section are made removable. These cases fall into two general classes: (1) Suits involving a federal question, which may be removed by the "defendant or defendants," and (2) All other suits of which the Circuit Courts are given jurisdiction by the preceding section, which may be removed

[5]Rev. St., §§ 641, 643, 644, 4 Fed. St. Ann. 258-264.

[6]Mexican Nat. R. Co. *v.* Davidson, 157 U. S. 201; Cochran *v.* Montgomery County, 199 U. S. 260.

"by the defendant or defendants therein, being non-residents of that state." The third and fourth clauses provide for the special cases of removal of "separable controversies," and removal on account of "prejudice or local influence."

§ 66. Enumeration of Removable Causes.

Construing §§ 1 and 2 of the act of 1888 together, it appears that there are seven classes of suits that may be removed under § 2, as follows:

(1) *Cases involving Federal Questions.*—Cases arising under the Constitution, laws and treaties of the United States where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of $2,000. Defendant may remove, whether resident or non-resident of the state.

(2) *Suits by United States.*—Controversies in which the United States are plaintiffs or petitioners. The amount involved is immaterial. Non-resident defendant may remove.

(3) *Cases of Diverse Citizenship.*—Controversies between citizens of different states in which more than $2,000 is involved. Defendant, if a non-resident, may remove.

(4) *Cases of Conflicting Land Grants.*—Controversies between citizens of the same state claiming lands under grants of different states, without reference to amount involved, are within the jurisdiction of the Circuit Courts under § 1, and hence, under § 2, appear to be removable by non-resident defendants, but this case is specially provided for in § 3 of the same act which provides for removal by either plaintiffs or defendants, where the matter in dispute exceeds the sum or value of $2,000. This is the only case which may be removed by the plaintiff. These cases practically never arise.

(5) *Suits Between Citizens and Aliens.*—Controversies between citizens of a state and foreign states, citizens or sub-

jects, where more than $2,000 is involved. Non-resident defendant may remove.

(6) *Separable Controversies.*—The third clause of the section is as follows: "And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the Circuit Court of the United States for the proper district." The language of this clause is ambiguous in several particulars. It is not clear what suits are included, whether any particular amount must be involved, and whether a resident defendant as well as a non-resident may remove. This clause has given rise to much litigation.

The statute contemplates a condition which may arise especially in chancery suits, that in the suit there may be two or more causes of action or controversies each of which might have been made the subject of an independent suit. These are called "separable controversies."

What Constitutes a Separable Controversy.—It is frequently difficult to determine what constitutes a separable controversy within the meaning of this clause, and numerous cases involving this question have arisen. In general, to constitute a separable controversy, there must be a separate and distinct cause of action upon which a separate and distinct suit could have been brought and complete relief afforded as to such cause of action, and in which all the necessary parties on one side are citizens of different states from all those on the other; that is, the case must be capable of separation into parts, so that in one of these parts a controversy will be presented, with citizens of one or more states on one side, and citizens of other states on the other, which can be fully determined without the presence of any of the other parties to the suit, as it has been begun. It seems, however, that such

separate controversy must be a substantial one and not merely incidental to the main purpose of the suit as brought.[7]

Removal Carries Entire Suit.—The removal of the separable controversy carries the entire suit into the Circuit Court,[8] even though the entire suit could not have originally been brought therein,[9] a doctrine which would seem to present some constitutional difficulties if the entire suit were not within the federal judicial power as defined by the Constitution.[10]

(7) *Cases of Prejudice or Local Influence.*—Under the fourth clause of the section, where a suit is brought in a state court by a citizen of that state against a defendant not a citizen or resident of that state, the defendant may remove if he can make it appear to the Circuit Court that owing to prejudice or local influence he cannot obtain justice in the state court, or in any other state court to which the cause might be removed under state laws. Many cases have arisen under this clause. It has been held by the Supreme Court that the matter in dispute must exceed the sum or value of $2,000 though the statute is not clear on that point.[11] Though conveniently considered separately, it has been held that this clause does not in fact furnish a separate and independent ground or case of removal, but merely describes a special case comprised in the preceding clauses.[12]

§ 67. Who May Remove—Amount in Controversy.

From the foregoing it appears that only a defendant can

[7]18 Enc. Pl. & Pr. 209-232; Blake *v.* McKim, 103 U. S. 336; Geer *v.* Mathieson Alkali Works, 190 U. S. 428, 432.

[8]18 Enc. Pl. & Pr. 234; Barney *v.* Latham, 103 U. S. 205.

[9]18 Enc. Pl. & Pr. 232; Barney *v.* Latham, 103 U. S. 205; Connell *v.* Smiley, 156 U. S. 335.

[10]See discussion in Whelan *v.* New York, etc., R. Co., 35 Fed. 849. See also, 18 Enc. Pl. & Pr. 213.

[11]In re Pennsylvania Co., 137 U. S. 451.

[12]Cochran *v.* Montgomery County, 199 U. S. 260.

remove a suit except in the case of conflicting land grants, in which either plaintiff or defendant may remove; and, further than only a *non-resident* defendant can remove except in cases involving federal questions, conflicting land grants, and, possibly, separable controversies. The matter in dispute, exclusive of interest and costs, must exceed the sum or value of $2,000 in all cases except where the United States are plaintiffs or petitioners, and possibly in case of separable controversies.

§ 68. Waiver of Right to Remove.

A party entitled to a removal may waive his right to removal in a particular suit, as, for example, by not asserting it. But it seems that the general right to remove causes cannot be waived. Thus a foreign corporation cannot be required to waive such right as a condition of being allowed to do business in a state. State statutes making the right of foreign corporation to do business in the state conditioned upon their agreeing not to remove suits to the federal courts have been held unconstitutional upon the ground that the right to remove is a constitutional right of which a party cannot be deprived by state legislation.[13]

§ 69. Procedure.

The procedure for removal is prescribed by the statute. In general it is quite simple. Except in the case of removal for prejudice or local influence, the defendant files in the *state court,* at or before the time when he is obliged to answer or plead to the declaration or complaint, a *petition* setting

[13]Home Ins. Co. *v.* Morse, 20 Wall. 445; Doyle *v.* Continental Ins. Co., 94 U. S. 535; Barron *v.* Burnside, 121 U. S. 186; So. Pac. R. Co. *v.* Denton, 146 U. S. 202. Whether the state could revoke the license of the foreign corporation for a disregard of such a condition, is not settled. See Cable *v.* United States Ins. Co., 191 U. S. 288, 307.

forth all the facts entitling him to removal and praying for the removal of the suit to the Circuit Court of the district in which the suit is pending. He must file therewith a *bond* for entering in the Circuit Court at the first day of its next session a copy of the record and for paying all costs awarded in that court should it decide that the cause was improperly removed. If the petition and bond are correct in form, it is the duty of the state court to accept them and proceed no further in the suit. An order granting removal should properly be entered, but is not necessary. The state court may determine the sufficiency in law of the petition and bond, but cannot investigate questions of fact.

Upon the filing of a proper petition and bond the cause is *ipso facto* removed to the Circuit Court and the state court loses jurisdiction, but the Circuit Court cannot proceed until it receives a copy of the record, which it may compel the state court by *certiorari* to send up. If the Circuit Court decides that the cause was improperly removed, it remands the cause to the state court, and from its order remanding there is no appeal. If it retains the cause, the trial proceeds as though the suit were originally begun in the Circuit Court.

The state court is not bound to surrender its jurisdiction of a suit on a petition for removal until a case has been made which shows upon its face that the petitioner has a right to the transfer. The state court, if it deems that the petition shows no such case, may try the cause, subject to the right of the Supreme Court to review its action.[14] This action of the state court will not, however, prevent removal to and trial in the Circuit Court. And should the state court proceed to try the cause notwithstanding removal, the defendant may defend in both courts, and both judgments may be reviewed by the Supreme Court. The defendant in such case, does not

[14]Stone *v.* South Carolina, 117 U. S. 430; Missouri Pac. R. Co. *v.* Fitzgerald, 160 U. S. 556.

waive his right to removal by defending the suit in the state court.[15]

Where the Ground for Removal is Prejudice and Local Influence, the petition must be filed in the Circuit Court and not in the state court, and must be accompanied by affidavits proving the existence of the local prejudice, and perhaps affidavits without any formal petition may be sufficient.[16]

[15]Powers *v.* C. & O. R. Co., 169 U. S. 92.

[16]See generally, as to removal of cause and procedure thereon, 2 Foster, Fed. Prac. (2nd ed.) ch. 29; 18 Enc. Pl. & Prac. 150; Moon, Removal of Cause; 4 Fed. St. Ann. 312-380.

CHAPTER VI.

PROCEDURE.

§ 70. In General.

It is not proposed in this work to discuss in detail matters of pleading, practice, and procedure in the federal courts. It is impossible for the student in the time that can be given in the usual law course to the study of federal jurisdiction and procedure to obtain more than a very general notion of the subject. Moreover, ordinarily the student would have little or no occasion to make use in actual litigation of the knowledge of this subject which he might acquire in a law school. By the time he is called upon to bring a suit in a federal court the average young practitioner would have forgotten any details of federal procedure he might have learned at school, and would have to learn the subject anew. Again, distinct courses are offered in the general subject of pleading, practice, and procedure, which, for the most part, will apply as well to the federal courts as to the state courts. Because, then, it is both impracticable and unnecessary in this course to discuss procedure in detail, only a general description of the subject will be given. Incidentally the subject has already been touched upon in various connections.[1]

§ 71. Procedure at Law.

In general, the procedure of federal courts of law is the

[1]See generally, Foster Federal Practice (2 vols. 3rd ed. 1901); Rose, Code of Federal Procedure (3 vols., 1907).

same as that of the corresponding courts of the state in which the federal courts are held. It is provided by statute that "The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the Circuit and District Courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such Circuit or District Courts are held, any rule of court to the contrary notwithstanding."[2] The principal object of this statute seems to have been to relieve the lawyers from the burden of having to learn two systems of procedure.[3] Subject to the provisions of this section, and to rules made by the Supreme Court, the federal courts may make their own rules regulating their own practice.[4]

The right of trial by jury is guaranteed by the Seventh Amendment to the Constitution, which provides that "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law."[5] This right may be waived by written agreement of the parties.[6]

§ 72. Procedure in Equity.

The procedure of the federal courts of equity is entirely independent of that of the state courts. In general it is the same as that of the former High Court of Chancery of England as modified by statute and by rules of court. It is provided by statute that "The forms of mesne process and the

[2]Rev. St., § 914, 4 Fed. St. Ann. 563-577.

[3]Nudd *v.* Burrows, 91 U. S. 426; Indianapolis, etc., R. Co. *v.* Hoist, 93 U. S. 291.

[4]Rev. St., §§ 917-918, 4 Fed. St. Ann. 583-586.

[5]For discussion of this provision, see 9 Fed. St. Ann. 335-351.

[6]Rev. St., §§ 648, 649; Baylis *v.* Travellers' Ins. Co., 113 U. S. 316.

forms and modes of proceeding in suits of equity and of admiralty and of maritime jurisdiction in the Circuit and District Courts shall be according to the principles, rules, and usages which belong to courts of equity and of admiralty, respectively, except when it is otherwise provided by statute or by rules of court made in pursuance thereof; but the same shall be subject to alteration and addition by the said courts, respectively, and to regulation by the Supreme Court, by rules prescribed, from time to time, to any Circuit or District Court, not inconsistent with the laws of the United States."[7] The Supreme Court has prescribed about one hundred "Rules of Practice for the Courts of Equity of the United States," known as the "Equity Rules."[8]

§ 73. Criminal Procedure.

Though there are no common-law offenses against the United States, the rules of the common law governing criminal procedure and practice are in force in the federal courts, except in so far as these rules have been modified by law.[9]

Criminal proceedings are subject to the provisions of Amendments IV, V, VI, and VIII to the Constitution.[10] Amendment V provides that "No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeop-

[7]Rev. St., § 913, 4 Fed. St. Ann. 561.

[8]See generally, Street, Federal Equity Practice, 3 vols., 1909. As to the power of the Supreme Court to regulate the practice of the Circuit Court and District Courts, see Rev. St., § 917, 4 Fed. St. Ann. 583. For present form of Equity Rules and other rules, see appendix to 210 U. S.

[9]22 Enc. Pl. & Pr. 312. For statutory provisions, see 2 Fed. St. Ann. 319-361. See also, United States v. Reid, 12 How. 361.

[10]See 9 Fed. St. Ann. 249-255.

ardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law."[11] Amendment VI provides that "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."[12]

Amendment VIII provides that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[13]

§ 74. Procedure in Admiralty.

The system of pleading and procedure of the admiralty courts is much like that of the courts of equity, though even more free from technical rules. The Supreme Court is given power by Congress to regulate the practice of the District and Circuit Courts in admiralty suits,[14] and under this power has adopted rules of practice in admiralty and maritime causes known as the Admiralty Rules.[15]

There are two kinds of admiralty proceedings: a suit *in*

[11]See 9 Fed. St. Ann. 256-304.

[12]See 9 Fed. St. Ann. 335-351. See also, Const., Art. III, § 2, which provides that "The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed." See 9 Fed. St. Ann. 128-132.

[13]See 9 Fed. St. Ann. 352-354.

[14]Rev. St., § 917, 4 Fed. St. Ann. 683.

[15]The Admiralty Rules in their present form will be found in the appendix to 210 U. S.

personam, and a suit, or more properly a "libel," *in rem.* The former proceeding is directed against a personal defendant, while the latter is directed against a vessel or other property. The two kinds of proceedings may sometimes be united in a single suit. The first pleading in an admiralty suit is the libel, which corresponds to the declaration at law or the bill in equity. Other proceedings are the claim (in a proceeding *in rem*), the answer, the replication, etc. The trial is ordinarily by the court without a jury, there being no right to a jury trial except where so provided by statute. The Supreme Court has made no rules on the subject of evidence, and each court is governed by its own rules. In some districts the witnesses are examined in open court; in others their testimony is taken down before trial by commissioners and presented to the court in writing. The commissioners have the powers of a master in chancery and proceedings before a commissioner are similar to those before a referee or master. The rules of evidence are much the same as in other courts, though the admiralty courts are more liberal in admitting evidence.[16]

§ 75. Procedure in Bankruptcy.

The suit in bankruptcy under the Bankruptcy Act of 1898 is a special proceeding governed by the provisions of the act itself. The suit is instituted by the filing of a petition. The forms of petitions, schedules, etc., are prescribed by the Supreme Court. The suit is substantially a suit in equity.[17]

[16]See the title "Admiralty," in 1 Enc. L. & P. 1219.

[17]For an admirable book on the subject of bankruptcy prepared for the use of students, see "A Suit in Bankruptcy," by Prof. A. P. Staples of Washington and Lee University. See also, 22 Enc. Pl. & Pr. 340.

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